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HEADQUARTERS, DEPARTMENT OF THE ARMY
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PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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MILITARY LAW REVIEW

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Foreign Military Law Notes:

Comments:

THE ENFORCEMENT OF FOREIGN JUDGMENTS IN AMERICAN COURTS*

BY CAPTAIN DONALD B. SMITH**

I. INTRODUCTION

This article is a discussion of the efficacy in United States courts of money judgments rendered by the courts of foreign countries and of the relation of prevailing civil rules to the position of the military services regarding unsatisfied foreign money judgments against individual service members. Ancillary to this discussion is an examination of the treatment afforded domestic judgments by foreign courts in view of the reciprocal treatment afforded foreign judgments by some domestic jurisdictions. The concluding purpose of this article is to illustrate the immediate need for uniformity among domestic courts in their approach to the enforcement of foreign judgments and explore the means of accomplishing this uniformity.

The enforcement of foreign money judgments[1] by domestic courts has become a legal problem of increasing international complexity, directly affecting the judicial, political and commercial relationships between nations. The impact on the relations of any two particular nations is, in reality, the sum total of the treatment afforded one nation's individual judgment creditors when they seek to enforce domestic judgments in the national courts of their foreign judgment debtors. The French citizen bringing action in a court in the United States to enforce a valid French judgment against an American judgment debtor suffers an obvious injury if his judgment is not treated as conclusive on the merits. The attendant expense, loss of time and uncertainty of outcome in the process of relitigation work a cumulative injustice. When the courts of France retaliate against United

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[1] The term *foreign judgment* commonly connotes the judgments of sister states as well as the judgments of foreign countries. As used herein, the term is restricted to the judgments of foreign countries unless otherwise indicated.

States judgment creditors in their courts by requiring trial de novo of the issues, the injustice becomes reciprocal. Conversely, by giving conclusive effect to the money judgments of foreign courts the ends of justice are served for the individual litigants. Also, a more favorable climate is created for the conduct of commercial activity and political understanding between nations.

The unprecedented increase in material productivity and trade among the free nations makes the problem of recognizing and enforcing foreign money judgments a significant one for the legal profession generally. The attendant increase in litigation accompanying expanding international business activity heralds a critical need for judicial harmony comprehensive to the commercial transaction conceived in Paris and consummated in New York. Academic interest in the abstract as incentive for the study and understanding of foreign law and foreign judicial process is being supplanted by the practical needs inherent in keeping the legal profession abreast of economic trends.

In view of the continuing Communist threat of world domination and subjugation it may be safely assumed that large contingents of American armed forces will continue to be based on friendly foreign soil as a bulwark to the defense of host nations for some time to come. Although our service personnel, their dependents and persons accompanying the forces form the largest goodwill ambassador corps our country has ever known, it is inevitable that, in the conduct of their daily affairs, civil disputes between them and their hosts will arise. The problem of providing forums for the settlement of civil disputes between these overseas forces and host citizenries has been largely solved as a result of the treaties and agreements concerning the status of our forces.[2] Frustration of these agreements and the good relations sought to be maintained by them are experienced, however, when a litigant has been awarded a judgment which he cannot enforce against an American serviceman who has returned to his native country without having satisfied this legal obligation. In view of the relatively minor sums involved in most individual actions, it is not practical for the foreign money judgment creditor to retain counsel in the United States to sue on his judgment unless he is assured that it will be treated as conclusive on the merits by an American court. Otherwise, the expense of relitigation in the vast majority of the cases amounts to more than the amount of

[2] *E.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VIII, para. 9 [1953] 4 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.

the claim involved. In the aggregate, these unsatisfied money judgments against our service personnel present a public relations problem of the greatest magnitude for the United States.

The efficacy of foreign money judgments in United States courts is a matter of particular significance to the military lawyer. The scope of this problem area is illustrated by the experience of the Command Judge Advocate, United States Army, Europe, during the period from January 1959 through September 1961. In 1959, approximately 7,600 documents concerning civil actions involving United States Army personnel in Germany were processed through the International Affairs Section of the command. In 1960 the total number of documents processed rose to approximately 11,500, and for the first three quarters of 1961 the figure had already approximated 9,800 documents.[3] That these figures involve only Army personnel and only one foreign country is indicative of the volume of civil actions generated by our worldwide troop commitments.

Aside from the impact on our relations with friendly foreign citizenries resulting from the lack of satisfaction of money judgments rendered against American service personnel, the problem is a dual one for military lawyers. First, individual military judgment creditors seek advice concerning the validity and effect of foreign judgments rendered against them. The military lawyer must be familiar with the differing rules prevailing in the various federal and state jurisdictions in the United States. The application of these rules to a specific factual situation also requires a knowledge of the law of foreign judgments of the country in which the judgment was rendered, and the relationship of the law of that foreign country with the law of the domestic court in which enforcement is sought. Secondly, commanders seek guidance on the proper disposition of complaints against members of their commands alleged to be evading satisfaction of just foreign money judgments. The military lawyer is thus called upon to determine the policy of the military services regarding unsatisfied foreign money judgments against their members, and advise the commander of the administrative and disciplinary courses of action open to him in particular cases.

[3] Letter From Lieutenant Colonel Edward W. Haughney, Chief, International Affairs Branch, Office of the Judge Advocate, Headquarters, United States Army, Europe, to the author, October 23, 1961. A substantial number of these documents involved paternity actions, and while some cases generated the processing of more than one document, the majority of the volume of documents do represent individual cases.

The desire of mankind to establish a just and lasting peace through world law emphasizes the need for nations to afford a greater measure of respect for the judicial orders of other countries. By giving conclusive effect to the valid money judgments of foreign countries, domestic courts transcend distrust of other legal systems and the cultures they are designed to serve. In view of our international image as a nation seeking justice for all nationalities, it is anomalous that courts in the United States have not taken a more progressive approach to the enforcement of judgments of other countries. Since the law of foreign judgments in this country has developed exclusively as judge-made law, the rules of various jurisdictions have become dissimilar and, in many cases, unjust for judgment creditors of particular foreign countries. Political, social and economic trends, coupled with a demand for individual justice, dictate an immediate need for uniformity of treatment of foreign judgments among the various jurisdictions of the United States. This need is punctuated by the demand for rejecting judicial discrimination against valid judgments rendered by the courts of particular countries of the free world. Through treaty arrangements the United States can truly meet her obligation as leader of the movement for world peace through law.

In examining the efficacy of foreign judgments in United States courts, the subject matter of this article will be restricted to in personam money judgments. Consideration of installment alimony awards[4] and paternity support judgments[5] are not included. Foreign judgments in rem and quasi in rem present no enforcement problem for courts since the res involved is within the territorial jurisdiction of the court rendering the judgment or decree.[6] Judgments involving status, such as marriage, divorce and adoption, if valid where rendered, are generally regarded as valid everywhere.[7]

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[4] Foreign judgments must be reduced to a sum certain to be enforceable in United States courts, and installment awards do not satisfy this requirement. Goodrich, Conflict of Laws § 215 (3d ed. 1949).

[5] States viewing paternity actions as quasi-criminal do not enforce foreign paternity support awards on the ground that to do so would be to enforce the police regulations of another state or country. Annot., 16 A.L.R.2d 1103–04 (1951); In re Neidnig's Estate, 123 App. Div. 894, 108 N.Y.S. 478 (1908). Support awards by domestic courts based on foreign determinations of paternity are beyond the scope of this article. For the policies of the services in this regard, see Army Regs. No. 608–99 (Oct. 29, 1956); Air Force Reg. No. 35–70 (Sept. 9, 1958); Navy Bupers Instruction 1620.1b (April 11, 1956).

[6] Mankin v. Chandler & Co., 16 Fed. Cas. 625 (No. 9,030) (C.C.E.D. Va. 1823).

[7] Restatement, Conflict of Laws §§ 109–18 (1934).

II. HISTORICAL BACKGROUND

The ancient Roman maxim was *res judicata pro veritate accipitur,* or, foreign judgments in personam are given effect everywhere.[8] This maxim was not effective in Western Europe, however, after the decline of the Roman Empire. In the Netherlands, a decree of 1580 provided that judgments of one Dutch jurisdiction would be enforced in all other Dutch jurisdictions.[9] In France, the Code Michaud of 1629 negated the hesitation of French courts to enforce the judgments of other French courts.[10] Article 120 of that Code provided that such judgments would be enforced without fee, re-examination of the merits, or hearing the parties. Article 121, however, provided that judgments of *foreign countries would not* be so enforced. French parties to foreign judgments were given the right to relitigate the issues de novo, the foreign judgment notwithstanding. The establishment of this doctrine has influenced the law on the enforcement of foreign judgments all over the world, common law countries included, for three centuries. Although the Napoleonic Code replaced the Code Michaud, it contained no provision of any kind concerning the effect to be given to foreign judgments.[11] Finding no applicable provision in the Code to guide their decision, the French Cour de Cassation looked to past French law and found it to be the same as the Code Michaud provisions.[12] Both Belgium[13] and the Netherlands[14] followed the French lead and, by early legislation, forbade their courts to give conclusive effect to foreign judgments except in those cases where treaty would specifically so provide.

The early rule concerning the enforcement of foreign judgments in the courts of Great Britain paralleled the development of the law on the continent. In 1778 in *Walker v. Witter,*[15] it was held that foreign judgments were merely prima facie evidence of

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[8] Nadelmann, *Non-Recognition of American Money Judgments Abroad and What To Do About It,* 42 Iowa L. Rev. 237 (1957).

[9] *Ibid.* It is noted, however, that foreign judgments were enforced in Holland as a matter of comity while judgments of other Dutch jurisdictions were enforced as a matter of necessity.

[10] *Id.* at 238.

[11] *Id.* at 242.

[12] *Ibid.*

[13] *Id.* at 244.

[14] *Ibid.*

[15] 99 Eng. Rep. 1 (K.B. 1778).

debt and thus examinable on the merits when sought to be enforced in British courts.

The effect of this British rule on early case law in the United States was appreciable. The *Walker* case was even cited as authority in early American decisions to avoid granting conclusive effect to the judgments of sister states, the full faith and credit clause of the Constitution notwithstanding.[16]

Although a new action on the judgment of a sister state within the United States must be brought to enforce the judgment in a local court, the law surrounding the recognition and enforcement of sister state money judgments is now well settled. Article IV, Section 1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, records, and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the effect thereof.

Congress has extended the full faith and credit clause to states and territories respectively.[17] Judicially, the problem of what effect a state should grant to the judgments of sister states has also been laid to rest.[18] It has been suggested that Congress has the power, under the full faith and credit clause, to provide for the direct enforcement of judgments of sister states.[19] There has been no such legislation, however, and the common law rule of bringing an action in the second state on the judgment rendered in the first still prevails.[20]

The full faith and credit clause, however, does not extend to the judgments of foreign countries.

> No such right, privilege, or immunity, however, is conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations. . . .[21]

The law concerning the efficacy of foreign judgments in the the United States has developed by judicial decision. The absence of federal treaty and statute provisions on the subjects have permitted the various states to take different approaches in determining the effect of foreign judgments. The law is still developing along these lines.

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[16] Hitchcock v. Aicken, 1 Cai. R. 460 (N.Y. Sup. Ct. 1803); Bartlet v. Knight, 1 Mass. 401 (1805).

[17] 28 U.S.C. § 1738 (1958).

[18] Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813).

[19] Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 Yale L. J. 430 (1919).

[20] Yntema, *The Enforcement of Foreign Money Judgments in Anglo-American Law*, 33 Mich. L. Rev. 1129 (1935).

[21] Aetna Life Insurance Co. v. Tremblay, 223 U.S. 185, 190 (1912).

III. AMERICAN LAW OF FOREIGN JUDGMENTS

A. *THE CONFLICTING VIEWS*

The law of foreign judgments in the United States is split between those authorities embracing the Supreme Court doctrine of reciprocity and those adhering to the rule of conclusive effect. Although the trend is toward conclusive effect for valid foreign money judgments, the doctrine of reciprocity is still of sufficient vitality to cloud the expectations of the foreign judgment holder in those cases where it is necessary for him to bring an action in a court in the United States to enforce his judgment.

United States courts applying the reciprocity doctrine afford the in personam judgments of a foreign jurisdiction exactly the same effect that is afforded American judgments in the courts of that foreign jurisdiction. If the court in which the action to enforce the judgment is brought follows the doctrine of reciprocity, retrial of the issues is permissible notwithstanding a showing of jurisdiction over the person and subject matter and without the necessity of the defendant averring fraud or any other defense to the original action.

Thus, the Parisian merchant suing in a court in the United States to enforce his French judgment against an American judgment debtor will be forced to relitigate the entire case since French courts permit a trial de novo of United States judgments. On the other hand, since British courts give conclusive effect to United States money judgments, domestic courts practicing reciprocity give conclusive effect to valid British money judgments. Since in particular cases, the merit and validity of the French judgment might far outweigh the relative merit of the British judgment, the rule of reciprocity may well be a doctrine of reprisal inuring to the obvious injustice of the individual judgment holder.

On the other hand, those courts following the rule of conclusive effect do not base the conclusiveness of foreign judgments on the nationality of the court rendering the judgment. Instead, valid money judgments of foreign countries are treated as conclusive and final, subject only to the recognized defenses which are available against the judgments of the courts of sister states.

B. *RECIPROCITY JURISDICTIONS*

In 1895 the Supreme Court established the reciprocity doctrine

in the United States in the companion cases of *Hilton v. Guyot*[22] and *Ritchie v. McMullen*.[23] In *Hilton*, a French judgment creditor sued in a federal court to enforce a French money judgment against an American judgment debtor. Defendant contended that the trial court should examine the merits of the case since a French court would retry the issues before granting enforcement of a United States judgment. The trial court refused to examine the merits of the case and gave conclusive effect to the French judgment. In a five to four decision, the Court held that since France did not extend conclusive effect to the judgments of United States courts, such effect would be refused the judgments of French courts. The Court said:

> The reasonable, if not the necessary conclusion appears to us to be that judgments rendered in France, or in any other foreign country by the laws of which our own judgments are reviewable upon the merits, are not entitled to full faith and conclusive effect when sued upon in this country, but are prima facie evidence only of the plaintiff's claim.[24]

In expounding the reciprocity doctrine, the Court also said:

> In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.[25]

In the dissent, Chief Justice Fuller felt it improper to deviate from the general rule on the sole ground that the French courts refused to grant conclusive effect to United States judgments. He said:

> The application of the doctrine of res judicata does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary.[26]

This statement highlights the major legal objection to the reciprocity doctrine. In a system of government based on the separation of executive, legislative and judicial powers, it is anomalous for the courts to disregard well established rules of law in favor of founding a decision on a political expedient.

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[22] 159 U.S. 113 (1895). The elaborate dicta of this case is an exhaustive study of the law of several of the European countries on the enforcement of foreign judgments and a statement of several basic rules still prevailing in the United States.

[23] 159 U.S. 235 (1895).

[24] 159 U.S. at 227.

[25] *Id.* at 228.

[26] *Id.* at 234.

In *Ritchie v. McMullen*,[27] the Court held that a Canadian judgment should have been given conclusive effect in the lower court, on the basis that English law prevailed in Canada, and English law afforded conclusive effect to United States judgments. The reciprocity doctrine announced in the *Hilton* and *Ritchie* cases is the only Supreme Court pronouncement on the efficacy of foreign judgments.[28]

In those state jurisdictions where the question has been considered, eleven states do not grant conclusive effect to foreign judgments. These jurisdictions are composed of those states adhering to the reciprocity doctrine of the *Hilton* case and those states embracing a principle of unlimited judicial review of foreign judgments.

In *Traders Trust Co. v. Davidson*,[29] Minnestota considered the efficacy of foreign judgments and adopted the reciprocity doctrine by declaring:

> Effect is given to foreign judgments as a matter of comity and reciprocity, and it has become the rule to give no other or greater effect to the judgment of a foreign court than the country or state whose court rendered it gives to a like judgment of our courts.[30]

The reciprocity doctrine has also been adopted by Florida[31] and Texas.[32]

Maryland applies the reciprocity rule by virtue of *Northern Aluminum Co. v. Law*,[33] wherein it was held:

> That is, we give full faith and credit to judgments of foreign countries when a like recognition is given by the courts of such countries to the judgments of our courts.[34]

Prior to the admission of Alaska into the Union, a federal district court sitting in the territory gave conclusive effect to a Candian judgment on the basis of reciprocity, declaring, on the same basis, that a French judgment would not be accorded such effect.[35] Since the issue has not been reviewed subsequent to

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[27] Note 23 *supra*.

[28] The rule of reciprocity is restricted to the case in which a foreigner recovers in his court and seeks to enforce the judgment against an American in a court in the United States. A judgment between two citizens of the same country is treated as conclusive everywhere and one invoking the jurisdiction of a foreign court is bound by its judgment. A citizen's judgment against a foreigner in the foreigner's court is also treated as conclusive.

[29] 146 Minn. 224, 178 N.W. 735 (1920).

[30] Id. at 227, 178 N.W. at 736.

[31] Ogden v. Ogden, 159 Fla. 604, 33 So.2d 870 (1948).

[32] Banco Minero v. Ross, 106 Tex. 522, 138 S.W. 224 (1911).

[33] 157 Md. 641, 147 Atl. 715 (1929).

[34] *Id.* at 646, 147 Atl. at 717.

[35] Alaska Commercial Co. v. Debney, 144 Fed. 1 (9th Cir. 1906).

Alaskan statehood, the decision is still precedent in that jurisdiction.

In *Levicky v. Levicky*,[36] it was indicated that New Jersey would give conclusive effect to foreign judgments. The case, however, involved a foreign decree regarding status. Although the language of the case was broad enough to include foreign money judgments, citation of the *Hilton* case as precedent by the court is sufficient to indicate reciprocity to be the rule for money judgments of foreign countries in New Jersey in spite of the distinction not having been drawn.

In Wyoming, dictum in *Union Securities Co. v. Adams*[37] alluded to the judgments of foreign countries and declared the reciprocity doctrine to be the rule in that state. The same situation prevails in Ohio,[38] where the court, although determining the effect of a foreign adoption decree, cited the reciprocity rule enunciated in the *Hilton* case to be applicable to in personam judgments.

In *Tremblay v. Aetna Life Ins. Co.*,[39] the court announced that the doctrine of unlimited judicial review was the rule in Maine.

Oregon[40] and Montana[41] have not judicially determined the effect of foreign judgments in their courts. Statutes in both states, however, declare foreign judgments to be presumptive evidence of a right as between parties. The employment of the presumptive evidence terminology in the statutes as distinguished from that of conclusive evidence indicates a legislative intent to establish the doctrine of unlimited judicial review.

No reported case has been found where a foreign judgment was reduced to a domestic judgment in a state following the doctrine of conclusive effect and then that domestic judgment sued upon in a reciprocity state for enforcement. The full faith and credit clause of the Constitution and Congressional mandate[42] for full recognition and enforcement of sister state judgments would seemingly require, however, that the domestic judgment be treated as conclusive.

C. *CONCLUSIVE EFFECT JURISDICTIONS*

Professor Goodrich theorizes that since torts and contracts founded on foreign operative facts are entertained in domestic

[36] 49 N.J. Super. 562, 140 A.2d 534 (Super. Ct. Ch. 1958).
[37] 33 Wyo. 45, 236 Pac. 513 (1925).
[38] In re Vanderborght, 57 Ohio L. Abs. 143, 91 N.E.2d 47 (Ct. C.P. 1950).
[39] 97 Me. 547, 55 Atl. 509 (1903).
[40] Ore. Rev. Stat. § 43.190 (1959).
[41] Mont. Rev. Codes § 93–1001–27 (1947).
[42] 28 U.S.C. § 1738 (1958).

suits, *a fortiori*, there should be full recognition of the foreign judgment in which the rights and obligations of the parties have been definitely settled in a manner easily capable of proof through court records.[43] Another persuasive theory advanced in support of giving conclusive effect to valid foreign money judgments is that such judgments are the formal pronouncements of foreign sovereigns which demand recognition and enforcement under principles of international law.[44]

Those jurisdictions granting conclusive effect to foreign money judgments either expressly reject the reciprocity doctrine or else ignore it. The effect to be given a foreign judgment is an evidentiary matter and the states are not bound by the rules of evidence in use in the federal judiciary system. Since the *Hilton* case came to the Supreme Court from a lower federal court, the binding effect of the decision applies only to federal courts.

Among the states granting conclusive effect to valid foreign money judgments, New York's position has become most noteworthy. In 1893, two years in advance of the *Hilton* decision, New York announced its basic rule in *Dunstan v. Higgins*.[45] An Englishman had recovered a money judgment against an American in an English court. The English judgment creditor sued in a New York court to enforce his judgment and was met with an attempt to examine the merits of the case. On appeal it was held:

> It is the settled law of this state that a foreign judgment is conclusive upon the merits. It can be impeached only by proof that the court which rendered it had not jurisdiction of the subject matter of the action, or of the person of the defendant, or that it was procured by means of fraud.[46]

The effect of *Hilton v. Guyot* on this position was considered in New York in 1926. In *Johnston v. Compagnie Generale Transatlantique*,[47] Judge Pound pointed out that the rule in New York was as follows:

> Where a party is sued in a foreign country, upon a contract made there, he is subject to the procedure of the court in which the action is pending, and must resort to it for the purpose of his defense, if he has any, and any error committed must be reviewed or corrected in the usual way.[48]

In discussing the effect of the *Hilton* case it was declared:

> To what extent is this court bound by Hilton v. Guyot? It is argued with some force that questions of international relations and the comity of

[43] Goodrich, *op. cit. supra* note 4, at 603–04.
[44] Yntema, *supra* note 20, at 1131.
[45] 138 N.Y. 70, 33 N.E. 729 (1893).
[46] *Id.* at 71, 33 N.E. at 730.
[47] 242 N.Y. 381, 152 N.E. 121 (1926).
[48] *Id.* at 385, 152 N.E. at 122 (quoting Dunstan v. Higgins, 138 N.Y. 70, 33 N.E. 729 (1893)).

> nations are to be determined by the Supreme Court of the United States; that there is no such thing as comity of nations between the state of New York and the republic of France; and that the decision in Hilton v. Guyot is controlling as a statement of the law. But the question is one of private rather than public international law, of private right rather than public relations, and our courts will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights. A right acquired under a foreign judgment may be established in this state without reference to the rules of evidence laid down by the courts of the United States. [49]

In *Coulborn v. Joseph*,[50] Georgia also rejected the reciprocity doctrine in granting conclusive effect to an English judgment. The court said:

> The issue having been submitted and adjudicated in an apparently regular manner by a court of competent jurisdiction of a foreign country whose laws and judicial system are not only not inconsistent with, but in harmony with those fundamental concepts of justice under the law to which we are accustomed, the judgments there rendered will be by the courts of this state held to be conclusive, and rights thereunder accruing will be enforced by the courts of this state.[51]

Connecticut has not expressly rejected the doctrine of reciprocity, but the only case law on foreign judgments in that jurisdiction gave conclusive effect to an English judgment.[52] In view of the strong position advanced for granting conclusive effect to all valid foreign judgments, however, it is believed that judgments of countries not granting conclusive effect to United States judgments would not be subjected to the retorsion effect of the reciprocity doctrine.

In *MacDonald v. Grand Trunk R.R. Co.*,[53] the New Hampshire court dealt with a foreign judgment asserted in bar of a subsequent action on the same issues and cause, rather than one in which enforcement was being sought. The language of the court was sufficiently broad to conclude, however, that New Hampshire would give conclusive effect to valid foreign judgments.

The same situation occurred in Louisana, when the court in *The Succession of Fitzgerald*[54] said:

> It is the settled jurisprudence of this court that matters once determined by a court of competent jurisdiction, if the judgment has become final, can never again be called into question by the parties or their privies.[55]

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[49] *Id.* at 386, 152 N.E. at 123.
[50] 195 Ga. 723, 25 S.E.2d 576 (1943).
[51] *Id.* at 733, 25 S.E.2d at 581.
[52] Fisher v. Fielding, 67 Conn. 91, 34 Atl. 714 (1895).
[53] 71 N.H. 448, 52 Atl. 982 (1920).
[54] 192 La. 726, 189 So. 116 (1939).
[55] *Id.* at 731, 189 So. at 117.

As in New Hampshire, it is concluded that the Louisiana court's position places it among the states that grant conclusive effect to valid foreign money judgments.

The courts of California are required by statute to grant conclusive effect to valid foreign money judgments.[56] Judicial interpretation of this statute led the court in *164 East Seventy-Second Street Corp. v. Ismay*[57] to conclude:

> The courts are required by Section 1915 of the Code of Civil Procedure to give a final judgment of a foreign country the same effect as a final judgment rendered in this state.[58]

Deleware refused to apply the doctrine of collateral estoppel[59] to an issue decided by a Dutch court, but held that conclusive effect would otherwise be given to valid foreign judgments in that state.[60]

In Colorado, dicta in *Bonfils v. Gillespie*[61] indicated that the modern trend in this country was toward giving conclusive effect to in personam judgments rendered by the courts of foreign countries.[62]

In Missouri, the only reported case dealing with the efficacy of a foreign judgment is *Grey v. Independent Order of Foresters.*[63] Dictum indicates that, in the absence of such defenses as fraud or lack of jurisdiction, conclusive effect will be given to valid judgments of foreign countries in that state.

Truscon Steel Co. of Canada Ltd. v. Biegler[64] has been cited as authority for the proposition that Illinois gives conclusive effect to the valid judgments of foreign countries.[65] There is case conflict, however, as to the prevailing rule in that state. In the *Truscon* case the court held that the same force and effect would be given to valid judgments of foreign countries that would be

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[56] "A final judgment of any other tribunal of a foreign country having jurisdiction, according to the law of such country, to pronounce the judgment shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state." Cal. Civ. Proc. Code § 1915 (1915).

[57] 65 Cal. App.2d 574, 151 P.2d 29 (Dist. Ct. App. 1944).

[58] *Id.* at 576, 151 P.2d at 30.

[59] A former judgment is binding on all issues decided even though such issues arise in a subsequent suit on a different cause of action.

[60] Bata v. Bata, 163 A.2d 493 (Del. 1960), *cert. denied*, 366 U.S. 964 (1961).

[61] 25 Colo. App. 496, 139 Pac. 1054 (1914).

[62] This case has been cited by one federal court as stating the rule in Colorado to be one of conclusive effect. Gull v. Constam, 105 F.Supp. 107 (D. Colo. 1952).

[63] 196 S.W. 779 (Mo. App. 1917).

[64] 306 Ill. App. 180, 28 N.E.2d 623 (1940).

[65] 38 Cornell L.Q. 423, 428 n.30 (1953).

given to the judgments of sister states. The court stated by way of dicta in a later case that in the absence of treaty or statute, no greater effect would be given to the judgments of foreign countries than that effect given to our judgments by their courts.[66] It is believed that this apparent conflict between the rule of conclusive effect and the reciprocity doctrine can be resolved however,[67] and that the *Truscon* case still represents the true state of the law on the enforcement of foreign money judgments in Illinois.

D. *FEDERAL COURTS AND THE ERIE DOCTRINE*

Some of the decisions which have evolved in the federal courts illustrate the difficulty encountered in applying the reciprocity doctrine to the enforcement of foreign judgments. The majority in the companion cases of *Strauss v. Conried*[68] and *Gioe v. Westervelt*[69] found reciprocity to exist in the Austrian and Italian courts from which the respective judgments in issue emanated. Observing the fact that there had been no fraud or lack of jurisdiction in the procurement of the Italian judgment, the court stated:

> Truly, the judgment in this case is fearfully and wonderfully made, and, so far as one can make out from the documents, rankly unjust. Nevertheless, under authorities controlling upon this court, there seems to be nothing to do save to accept it as finality . . . and it appears that under Italian law similar judgments of the courts of this country are not reviewable upon the merits when sued on in Italy, but are given full credit and conclusive effect.[70]

Whether or not the judgment was so rankly unjust as to shock the conscience and preclude its enforcement on grounds of being contrary to natural justice in the due process sense is not evident from the opinion. It is a shining example, however, of the positive application of the reciprocity doctrine blinding a court to other available judicial means of disposing of a foreign judgment case in an equitable manner.

In re Aktiebolaget Kreuger and Toll[71] is exemplary of the difficulty encountered in practical attempts to determine if reciprocity with a particular foreign nation exists. After conclud-

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[66] Clubb v. Clubb, 402 Ill. 390, 84 N.E.2d 368 (1949).

[67] The *Clubb* case involved contempt proceedings for the non-payment of alimony adjudged in a foreign divorce decree. The quasi-criminal nature of the case was sufficient basis for rejecting its enforcement instead of relying on the reciprocity doctrine.

[68] 121 Fed. 199 (S.D.N.Y. 1902).

[69] 116 Fed. 1017 (S.D.N.Y. 1902).

[70] *Id.* at 1017–18.

[71] 20 F.Supp. 964 (S.D.N.Y. 1937).

ing that an original Swedish hearing had been a full and fair one, the court conjectured that the judgment should not be examined on the merits because a Swedish appellate court would *probably* treat a United States judgment as conclusive.

Prior to 1938, federal courts were free to apply what was considered a federal common law,[72] without regard to the laws of the particular state in which they sat. Further, federal courts were bound to follow the rule of reciprocity in *Hilton* without regard to the treatment afforded foreign money judgments by the courts of the states.[73]

In 1938, however, in *Erie R.R. Co. v. Tompkins*,[74] the Supreme Court held:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal common law.[75]

Strengthening the *Erie* doctrine in its application to the law of foreign judgments is the extension of the rule to the field of conflicts of law.[76] Although these decisions would seem to bind federal courts to give the same effect to foreign judgments as are given to them by the courts of the states in which they sit, the law is not settled in this regard. No decisions have been rendered to either affirm or deny the application of the *Erie* doctrine to the law on the enforcement of foreign judgments.[77]

Although some legal commentators conclude that fededal courts are not obliged either to apply or reject reciprocity in accordance with state rules,[78] caution must be exercised in accepting this view as a settled proposition of law. The Supreme Court treated the question of the efficacy of foreign judgments as an evidentiary one, as have the several state courts which have expressly rejected the *Hilton* rule. If the problem is an evidentiary one, not

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[72] Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

[73] Kessler v. Armstrong Cork Co., 158 Fed. 744 (2d Cir. 1907).

[74] 304 U.S. 64 (1938).

[75] *Id.* at 78.

[76] "We are of the opinion that the prohibition declared in Erie Railway Company v. Tompkins, against such independent determinations by the federal courts, extends to the field of conflicts of laws." Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, at 496 (1941).

[77] Although one federal court was presented with the opportunity to rule on this question, it evaded the issue and decided the case on other grounds. Gull v. Constam, *supra* note 62.

[78] "Since Erie R. R. v. Tompkins, the decision of the Supreme Court (Hilton v. Guyot) has lost most if not all of its value as a precedent even for the lower federal courts. . . ." Nadelmann, *supra* note 8, at 241.

involving a constitutional question, the argument can be made that reciprocity is a procedural matter to which the *Erie* and *Klaxon* cases do not extend.

The conflict created by the *Erie* doctrine is of no consequence to federal courts sitting in states which have adopted the *Hilton* rule of reciprocity nor in those states where no legislative or judicial rule on the effect of foreign judgments has been formulated. It is a matter of primary concern, however, to the federal court convening in a state where conclusive effect for foreign judgments is the rule. Forum shopping in these jurisdictions is the natural consequence if a conflict between federal and state courts within the same state is permitted to continue. The need for uniformity, at least within a particular state, is well illustrated by the divergence of treatment a foreign judgment creditor could receive in such a state. If the necessary jurisdictional amount existed, the judgment debtor could remove the suit for enforcement from a state court where conclusive effect to foreign judgments is given, to the federal court, and under the reciprocity rule be permitted to relitigate the issues.

E. *DEFENSES TO FOREIGN JUDGMENTS*

The defenses which are available to the enforcement of foreign judgments are well established. Moreover, they represent sufficient guarantees of fairness to the citizen judgment debtor. As in the cases where they are called upon to enforce the judgments of sister states, the courts are capable of insuring that foreign judgments are basically just and have been rendered in accordance with our ideas of judicial impartiality.

To be considered judicial actions, foreign proceedings necessarily have to allow the defendant notice and a fair opportunity to be heard before an impartial tribunal which has jurisdiction to hear the cause.[79]. Since the jurisdiction of a foreign court is universally tested according to the conceptions of the court called upon to enforce the judgment,[80] United States courts can satisfy themselves as to the existence of this requirement according to their own judicial precedents. The presumption that a court of first instance had jurisdiction over the person and subject matter is always open to attack.[81] A foreign judgment is enforced because it is a legal obligation. Obviously, if there was no juris-

[79] Goodrich, *op. cit. supra* note 4, § 205.
[80] Boivin v. Talcott, 102 F.Supp. 979 (N.D. Ohio 1951).
[81] Goodrich, *op cit. supra* note 4, § 209.

diction in the original tribunal, there can be no legal obligation to enforce.[82]

A judgment can always be impeached for fraud.[83] Although, as between sister states, the rules of the court rendering the judgment determine the issue of fraud, the rule in most American courts as to foreign judgments is more restrictive and thus of greater protection to the citizen judgment debtor. The local rule for determining fraud prevails unless it is more limited than the rule of the foreign court which rendered the judgment.[84] This principle applies to extrinsic fraud but not to intrinsic fraud. If the foreign court has adjudicated the issue of fraud, it is conclusive, be it extrinsic or intrinsic.[85]

Defenses available to the actions brought to enforce foreign judgments also include the denial of enforcement on grounds that local or national public policy would be offended thereby, or that the first judgment is contrary to the idea of natural justice. To offend public policy, the nature of the original proceedings must be repugnant, mere differences in court methods being insufficient to support the allegation; or else the nature of the claim itself upon which judgment was rendered would have to be established.[86]

Payment of the judgment obligation by the defendant discharges the obligation,[87] and the plaintiff is universally precluded from attempting recovery in a subsequent action elsewhere when the other party has already successfully defended the cause.[88]

IV. FOREIGN LAW OF FOREIGN JUDGMENTS

A. *GENERAL*

In those domestic jurisdictions where the reciprocity doctrine is still of vitality, it is necessary to determine the efficacy of

[82] Mere irregularities, however, in the rendition of the original judgment do not constitute a lack of jurisdiction. *Ibid.*

[83] *Id.* § 210.

[84] Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, at 794 (1950).

[85] *Ibid.*

[86] Although the due process clauses of the 14th and 15th Amendments have no applicability to foreign judiciaries, the theory has been advanced that a domestic court action to enforce a foreign judgment which shocks the sense of natural justice would in actuality be a state action, and thus unconstitutional. Goodrich, *op. cit. supra* note 4, § 211; see Shelley v. Kraemer, 334 U.S. 1 (1948).

[87] Restatement, Conflict of Laws § 442 (1934). See Matter of James, 248 N.Y. 1, 161 N.E. 201 (1928), for the problem raised by the fluctuation of currency rates subsequent to an original action in a foreign court, but prior to the action for enforcement of the judgment in a domestic court.

[88] Goodrich, *op. cit. supra* note 4, § 217.

United States judgments in a specific foreign country in order to ascertain the conclusiveness of judgments of that country in the local courts. The effect given to foreign judgments in other countries is almost as varied as the number of independent national jurisdictions which exist. A broad categorization of foreign countries in this field of the law permits most of them, however, to be divided into three groups. They are: (1) those granting conclusive effect subject to local defenses; (2) those granting reciprocal effect based on governmental determinations of reciprocity with specific foreign countries; and (3) those granting reciprocal effect based on judicial determinations of reciprocity with specific foreign countries. All courts are governed, of course, by whatever treaty arrangements their governments may have concluded with other nations. In any event, reciprocity does require a specific determination of the state of law in a country whose judgment is sought to be enforced. This task is, in many cases, a most difficult one.

B. *GREAT BRITAIN*

Great Britain[89] has not only abandoned the rule of *Walker v. Witter*,[90] but has become the most progressive judiciary in the world in its treatment of foreign money judgments. Twenty-five years prior to the adoption of the reciprocity doctrine by the Supreme Court in *Hilton v. Guyot*, Great Britain decided in *Godard v. Gray*[91] to grant conclusive effect to valid foreign money judgments. In that case, an action was brought in England to enforce a French judgment. The judgment debtor maintained that in rendering the judgment, the French court had been mistaken as to the proper interpretation of English law and, therefore, execution of the judgment should not be granted. It was held that foreign judgments could not be examined upon the merits due to a mistake of either law or fact. The court theorized that when a court of competent jurisdiction has adjudicated a claim, a legal obligation of debt arises on which an action for enforcement can be maintained. This principle has been followed consistently in English case law and has led to English judgments receiving preferential treatment throughout the world.

In 1920, the English doctrine of conclusive effect was legislatively enacted for the benefit of the members of the British Com-

[89] See generally, Borm-Reid, *Recognition and Enforcement of Foreign Judgments*, 3 Int'l & Comp. L.Q. 49 (1954).

[90] 99 Eng. Rep. 1 (K.B. 1778). See text accompanying note 15 *supra*.

[91] [1870] 6 Q.B. 139.

monwealth,[92] and, in 1933, the legislation was extended to include foreign countries.[93]

Treaty agreements with France, Belgium and the Federal Republic of Germany have resolved most of Great Britain's problems with those major powers which follow the reciprocity doctrine in the enforcement of foreign judgments.[94] As a matter of fact, a convention with Germany, signed at Bonn on July 14, 1960, but not yet ratified, is comprehensive enough to include judgments arising out of criminal actions, in which civil damages resulting from the criminal act are litigated concurrently in the German courts.[95]

C. *CANADA*

The federated structure of Canada is such that the judicial autonomy of the various provinces has led to a situation somewhat analogous to the United States law of foreign judgments. Difficulties raised by the dissimilarity of treatment of foreign judgments is compounded by the fact that Canadian provincial courts have not in the past felt obliged to give conclusive effect to the judgments of a sister province.[96] A Uniform Foreign Judgments Act for the enforcement of sister province judgments has been submitted, however, and has already been adopted by Saskatchewan and New Brunswick.[97]

In determining the reciprocal effect of United States judgments in a Canadian court, it is necessary to examine the law of the particular province concerned. Ontario[98] grants conclusive effect to valid foreign money judgments, while Quebec,[99] in keeping with the French influence of the Code Michaud, permits the judgment debtor to reargue the merits of the case if he so desires.

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[92] "A money judgment recovered in one jurisdiction may, upon application of the holder, be registered in the courts of another, after which registration it shall have the same effect as a judgment originally rendered by the latter court." Administration of Justice Act, 1920, 10 & 11 Geo. 5, c. 81.

[93] The British Foreign Judgments (Reciprocal Enforcement) Act of 1933, 23 Geo. 5, c. 13.

[94] Cohn, *Reciprocal Enforcement of Judgments With Western Germany*, 230 L.T. 375 (1960).

[95] The treaty provides for: ". . . judgments given in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party." *Id.* at 376.

[96] See generally, Nadelmann, *Enforcement of Foreign Judgments in Canada*, 38 Can. B. Rev. 68 (1960).

[97] *Id.* at 68–9.

[98] Nadelmann, *supra* note 8, at 246.

[99] *Ibid.*

Prince Edward Island[100] permits only its domiciliary residents to contest the merits of a foreign judgment. Manitoba,[101] like Quebec, permits the defendant in an action on a foreign judgment to plead the merits of the case. The law in Canada has not followed the English precedent in granting either conclusiveness or uniformity of treatment to foreign judgments.

D. *FRANCE*

Historically, France has followed the doctrine of *revision au fond*[102] in dealing with the enforcement of foreign money judgments. This doctrine is the basis for the chaotic principle of reciprocity. Although the doctrine of *revision au fond* prevails in France, its validity is being questioned increasingly by French jurists and legal commentators. In *Charr v. Hasim Ulusahim*,[103] the theory of unlimited judicial review was termed archaic by a court which gave conclusive effect to a Turkish judgment. The opinion noted the opposition of French legal commentators to the doctrine of *revision au fond* and the absence of any current code provision either permitting or imposing the doctrine. It was further noted that unlimited judicial review reduces the value of foreign judgments, forces a judgment creditor to bear the risk of a new law suit in contravention of the requirements of international cooperation, and is based on theories which were in effect at a time when knowledge of other legal systems was vague and uncertain. In addition, it was observed that French law has fully developed jurisdictional and other requirements to a point where the need for unlimited judicial review has ceased to exist.

It is also noteworthy, as an indication of the trend in France, that the French Committee on Private International Law unanimously rejected a proposal in the Draft Law on Private International Law, at a Paris meeting in May, 1955, which would have codified the doctrine of *revision au fond* and added the reciprocity doctrine as a code provision of French law.[104] Although judicial precedents of a long historical standing are not so easily uprooted from the law, the trend in France is toward more conclusive effect for foreign money judgments.

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[100] *Id.* at 247.

[101] *Ibid.*

[102] This doctrine permits complete judicial review of both law and facts of a case which has been adjudicated in a court of a foreign country.

[103] Cited in Nadelmann, *Recognition of Foreign Money Judgments in France*, 5 Am. J. Comp. L. 248 (1956).

[104] *Id.* at 249.

E. *OTHER COUNTRIES*

Italy is most progressive in its treatment of foreign money judgments, granting conclusive effect except for default judgments or those to which a defense is available under Italian law, such as lack of jurisdiction or fraud.[105] The default exception is not present, however, in treaty agreements between Italy and other nations on the mutual enforcement of judgments.

In Switzerland, the various Cantons are permitted to construct their own rules concerning the enforcement of foreign judgments. Most Swiss courts require reciprocity of treatment of Swiss judgments, however, as a prerequisite to granting conclusive effect to foreign judgments. Those courts adhering to the doctrine are permitted to make their own determinations of the existence of reciprocal treatment in particular foreign countries, excepting those instances where a treaty on the enforcement of judgments has been concluded with another power.[106]

The courts of the Federal Republic of Germany also adhere to the reciprocity doctrine, determining for themselves in which instances their judgments are accorded conclusive effect by foreign courts. The government has compiled a list, however, of those nations granting conclusive effect to German judgments. The United States does not appear on the list.[107]

Other nations following the reciprocity doctrine under a system of judicial determination are Japan,[108] Lebanon,[109] and Monaco.[110]

In Austria[111] and Denmark,[112] the government advises the courts whether or not reciprocity exists with a particular country, and the courts are bound by this determination.

Spain,[113] Egypt,[114] and some South American countries[115] have code provisions to the effect that foreign judgments are to be given the same effect that their judgments are given in the particular foreign countries involved. Mexico[116] provides for "inter-

[105] Nadelmann, *supra* note 8, at 245.
[106] *Id.* at 244.
[107] *Id.* at 253.
[108] *Id.* at 249.
[109] *Ibid.*
[110] *Ibid.*
[111] *Id.* at 249.
[110] *Ibid.*
[113] *Id.* at 250.
[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*

national reciprocity," but the meaning of the term is vague and has not been conclusively defined.

In Greece[117] and Portugal,[118] only those foreign judgments rendered against foreign nationals are treated as conclusive on the merits.

Belgium[119] and the Netherlands[120] both have code provisions governing the effect of foreign judgments; the former requiring judicial review on the merits of foreign judgments, and the latter requiring relitigation in Dutch courts of matters decided in foreign courts and sought to be enforced in Holland.

Norway and Sweden have treaties for the reciprocal enforcement of the judgments of each other, but generally deny conclusive effect to other foreign judgments.[121]

Israel is said to recognize and enforce foreign judgments in accordance with common law principles if the judgments meet the international tests of jurisdiction,[122] but there are no accompanying definitions of "common law" principles or "international tests" of jurisdiction.

Within the Eastern bloc of nations, judgments of any court of a Communist country can, as a matter of routine, be enforced in any other Communist country. Soviet Russia was classified prior to World War II as a nation which gave no effect to foreign judgments in the absence of treaty arrangements to the contrary.[123] Her growing role as an economic power has led to a relaxation of the rule, however, in the arbitration of trade disputes.[124]

V. FOREIGN JUDGMENTS AGAINST MILITARY PERSONNEL

In the vast majority of the foreign countries in which United States military personnel are stationed, they are amenable to civil suit in the courts of the host countries. Foreign money judgments rendered in civil suits against them are of concern to

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[117] *Id.* at 244–45.
[118] *Id.* at 245.
[119] *Id.* at 244.
[120] *Ibid.*
[121] *Id.* at 245–46.
[122] Levontin, *Foreign Judgments and Foreign Status in Israel*, 3 Am. J. Comp. L. 199 (1954).
[123] Wigmore, *The Execution of Foreign Judgments: A Study in the International Assimilation of Private Law*, 21 Ill. L. Rev. 1, at 11 (1926).
[124] See generally, Pisar, *The Communist System of Foreign Trade Adjudication*, 72 Harv. L. Rev. 1409 (1959).

the entire military establishment due to the impact which unsatisfied money judgments have on our relationships with a foreign country and its citizens. The immediate contact of the military lawyer with this problem occurs in two ways. First, he is called upon to advise the individual judgment debtor as to the validity and efficacy of the foreign judgment rendered against him. Secondly, he must furnish guidance to the commander for the proper disposition of cases in which it is alleged that service members are dishonorably evading the satisfaction of valid foreign money judgments. The responsibility of the military lawyer does not end, however, in furnishing this advice and guidance. His ultimate responsibility in this field lies in seeking a solution to the problems which beset the armed forces, of both a judicial and public relations nature, as a result of the unsatisfied judgments rendered against military personnel in overseas commands.

Three categories of military judgement debtors must be individually considered in any clear analysis of the enforcement possibilities against them. The first group is composed of those personnel who have sufficient assets within the foreign jurisdiction, and time remaining on their overseas tours in the jurisdiction, to permit enforcement of the judgment as a matter of fact. In this case, enforcement of the judgment is accomplished by the local authorities in accordance with local law, subject only to the prohibitions against levying on military property or property necessary to the serviceman in carrying out his military duties.

Another category is composed of those judgment debtors who return to the United States and are discharged from the military services without having satisfied the foreign judgments which were rendered against them. Although of concern to the military establishment, these cases can be resolved only through resort to the civil courts of the United States by the judgment creditors involved.

Of the greatest practical significance to the military services are the judgment debtors who, remaining in the service, return to the United States from foreign stations without having satisfied the judgments rendered against them. In advising these judgment debtors, several determinations must be made. First, the legal effect of the judgment must be tested, including the jurisdiction of the court rendering the judgment and the adequacy of the notice to the service defendant. It must then be determined if any other legitimate defense to the judgment exists. If no valid defense is apparent, the law of the state or federal forum in which enforcement will be, or is likely to be, sought must be

researched. If the forum adopts the reciprocity doctrine, it then becomes necessary to ascertain the effect of United States judgments in the courts of the country in which the judgment was rendered.

Once the validity of the judgment has been determined the position of the particular military service with regard to the nonsatisfaction of it must be explored. Necessary criteria for consideration are the various service regulations, policies and aspects of military law from which the courses for command action are drawn.

It is well settled that the military services do not act as collection agencies, either in cases of simple debt satisfaction or the enforcement of money judgments, foreign or domestic.[125] But, if a particular case so warrants, the commander may take administrative or disciplinary action against the recalcitrant service member. In either alternative, the various service regulations establish procedures for guidance.

The measures open to a commander against a member who evinces a dishonorable failure to satisfy just debts include administrative board action with a view to either reduction in grade or elimination from the service,[126] disciplinary action under the provisions of Article 15, Uniform Code of Military Justice, or trial by court-martial under Article 134, Uniform Code of Military Justice. The mere failure or neglect to satisfy a money judgment, however, without more, is not legally sufficient to support a court-martial charge of service discrediting conduct through dishonorable failure to pay debts.[127] There must be evidence of willful evasion, bad faith or false promise establishing dishonorable conduct on the part of the judgment debtor which is service discrediting.[128] The problem created by the fact that a judgment has been rendered against a service member in a particular case is the evidentiary effect to be given to the judgment by the services in determining the validity and merit of the underlying debt obligation.

Army regulations provide:

> Commanding officers will not tolerate actions of irresponsibility, gross carelessness, neglect, dishonesty, or evasiveness in the private indebtedness and financial obligations of their personnel. Normally, it is not difficult to distinguish between an honest denial of an obligation and a dishonest or irresponsible evasion thereof. A claim based upon a judgment,

[125] JAGA 1961/4746 (July 27, 1961).
[126] Dep't of Defense Directive No. 1332.14 (Jan. 14, 1959).
[127] CGCMS 20422, Alexander, 22 CMR 740 (1956).
[128] United States v. Kirksey, 6 USCMA 556, 20 CMR 272 (1955).

order, or decree of a court which appears valid on its face, should ordinarily be accepted by the commanding officer as *prima facie* evidence of the financial obligation established thereby. Such a judgment, however, may be rebutted by other evidence, such as a conflicting decree of another civil court. If, after consideration of all factors, a commanding officer believes that a member of his command has dishonorably failed to pay his just debts, disciplinary action may be initiated (articles 133 and 134, UCMJ and par. 213b, MCM, 1951).[129]

In applying these provisions to a specific factual situation, The Judge Advocate General of the Army has held that the sole concern of the Army is with the situation when service members bring discredit upon the service through a failure to satisfy a *valid* foreign judgment.[130] Further, the determination of whether or not the non-satisfaction of such a judgment is discrediting must be made by the immediate commander.[131]

Non-satisfaction of a civil judgment cannot be dishonorable if the underlying debt obligation is not a just one, nor can the judgment be regarded as evidence of the merit of the debt if the judgment is defective. Foreign money judgments are sufficiently complex in a legal sense to require professional evaluation of their validity.[132] In this regard, the Army encourages referral of all cases involving decrees or orders of foreign courts to The Judge Advocate General or the local staff judge advocate for consideration.[133] It is reiterated, however, that the responsibility of deciding what course of action to take, either administrative or disciplinary, in a particular case lies with the commander.[134]

The Air Force accepts court orders of municipal, state or federal courts of the United States as the legal determination of controversies in cases involving private indebtedness.[135] The regulations do not provide guidance, however, as to the effect of judgments of *foreign* courts. The opinion has been stated, how-

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[129] Army Regs. No. 600–10, para. 9*b* (Dec. 19, 1958).

[130] JAGA 1961/4476 (June 14, 1961).

[131] *Ibid.* Allaying any charge of command influence in the event the service member affected is subsequently tried by court-martial might also be a reason for not making service discrediting determinations in specific cases at departmental level, although such an opinion has never been officially expressed.

[132] Factors affecting the validity of a foreign judgment include: lack of representation at the trial or failure to understand the proceedings, trial held in absentia, recognition or enforcement of the particular judgment would be contrary to public policy, the suit did not dispose of the controversy on the merits, lack of jurisdiction over the person or the subject matter, and fraud in the procurement of the foreign judgment either by the party in whose favor it was rendered or by the court rendering it. JAGJ 1956/1775 (Feb. 10, 1956).

[133] JAGA 1958/1511 (Jan. 27, 1958).

[134] JAGA 1961/4068 (May 1, 1961).

[135] Air Force Reg. No. 35–29, para. 3 (Sept. 5, 1955).

ever, that foreign judgments should not be viewed as conclusive in any controversy unless declared to be enforceable by a domestic court.[136] The same situation prevails in the Navy, The Judge Advocate General of the Navy stating that foreign decrees and judgments should not be given administrative effect until their validity has been tested in a court in the United States.[137]

The position of the Air Force and the Navy represents at least a linguistic departure from the position of the Army, in that no distinction is made by the Army between the effect to be given the judgments of foreign and domestic courts. Since the Army judgment debtor is permitted to rebut the merit and validity of a foreign judgment, however, it is concluded that foreign money judgments are not considered as conclusive evidence of debt obligations by any of the military services.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. *CIVIL LAW*

Perpetuation of the reciprocity doctrine by American courts is judicial invasion of the political arena, and cannot be supported as a matter of morality, legality or practicality. Its only reward has been and shall continue to be retaliation against United States judgments by foreign courts.[138]

The reciprocity doctrine smacks of political sanction as opposed to judicial fairness and should be left to the exercise of political discretion if it is the desirable policy to embrace. One commentator terms the doctrine a display of "nationalistic emotionalism," and concludes that it has no place in the field of private international law. The subject of enforcement of foreign judgments is a matter concerning private individuals as opposed to one concerning national states or sovereigns.[139]

In those countries where reciprocity is the rule, when the reciprocal status of a country is determined by the government for the courts, the United States is never given conclusive effect status. If the courts are permitted to determine the matter for themselves, their training and experience in the civil law and code systems makes it difficult for them to understand our case

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[136] Op JAGAF 1949/70 (Feb. 23, 1949).

[137] Op JAGN 1957/354 (Apr. 29, 1957).

[138] For the various connotations of reciprocity as a principle of law, see generally, Lenhoff, *Reciprocity in Function: A Problem of Conflict of Laws, Constitutional Law, and International Law*, 15 U. Pitt. L. Rev. 44 (1953).

[139] Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical Critical Analysis*, 16 La. L. Rev. 465, at 482 (1956).

law system, thus, also negating recognition of American states which grant conclusive effect to their judgments, but without statutory provisions to that effect. In any event, the doctrine works to the detriment of the judgment holder when he seeks to enforce a United States judgment in one of those countries. If the purpose of the Supreme Court in adopting the reciprocity doctrine in *Hilton v. Guyot*[140] was to force other countries to give conclusive effect to civil judgments rendered in the United States, the purpose has not been achieved.

In view of the multifarious relationships entered into between the United States and its citizens with foreign states and their citizens, reciprocity as a principle of law in the enforcement of foreign judgments does not work to the justice of any of the parties and is not in keeping with the trend of the times. Judicial suspicion of the basic fairness and competence of the courts of foreign countries is a stumbling block to world peace and progress.

Several solutions have been suggested to untangle the present quagmire of differing rules among our state courts and the confusion resulting thereby in our relations with other nations in the mutual enforcement of money judgments. The ideal solution would be for the Supreme Court and the courts of the individual states to reject the reciprocity doctrine and give conclusive effect to valid foreign money judgments. In view of the uncertainty of this approach, however, both in point of time and uniformity, a more immediate solution to the problem must be found.

Another suggested solution is for the federal government to make bilateral or multilateral treaty arrangements with other nations.[141] The treaty being the supreme law of the land, superior to contradictory state law, uniformity of treatment of foreign judgments would result.

This approach appears to be the most practical and progressive one to the problem of enforcement of foreign money judgments. The treaty solution to the problem is legally unobjectionable and can be accomplished in a manner which is not inconsist-

[140] 159 U.S. 113 (1895).

[141] It has been suggested that Article 1, Section 8, Clause 3 of the Constitution permits Congress to give consent to the states to enter into separate compacts with foreign nations in this field, thus negating the encroachment of a federal treaty on the jealously guarded separate judicial powers of the states. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules on Private Law*, 102 U. Pa. L. Rev. 323, at 358 (1954). This suggestion appears too radical and controversial a departure from our traditional procedures, however, and perhaps too impractical, even if accomplished, to be of great value.

ent with the reservation of separate judicial powers by the several states of the United States.

The critics of the treaty approach insist that resort to treaties is unnecessary. The British Foreign Judgments Act is cited as working authority for the proposition that state legislation or national uniform legislation would be sufficient to unravel the tangle of conflicting rules.[142] It is also observed that countries differ so in their treatment of foreign judgments that not even a theoretical basis for a general international agreement could be laid.[143] Further, even those countries which have reciprocity with each other by agreement have no practical working definition of the doctrine sufficient to satisfy large groups of nations.[144] A problem obviously open to question in framing such an agreement is to conceive a definition of jurisdiction acceptable to all parties and arrive at a common denominator which would embrace local ideas of morality and public policy.[145]

It is submitted that these criticisms are without merit. To begin with, the federal government has the power to conclude treaty arrangements with foreign nations on the mutual enforcement of civil judgments. As a matter of fact, the treaty solution was envisaged by Justice Gray in *Hilton v. Guyot.*[146] Whatever question there might have been concerning the legal propriety of the federal government to act in this area was laid to rest by Justice Evans in *Santovincenzo v. Egan*[147] and Justice Holmes in *Ingenohl v. Olsen and Co.*[148]

The President should appoint qualified and respected experts in the fields of international law and conflicts of law to study the problems created by the American attitude toward the enforcement of foreign money judgments. A body to advise the President on such matters could be drawn from the American Law Institute and the National Conference of Commissioners on Uniform State Laws.[149]

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[142] Nadelmann, *supra* note 8, at 252.

[143] Wigmore, *supra* note 123, at 6.

[144] *Ibid.*

[145] See generally, Nussbaum, *Jurisdiction and Foreign Judgments*, 41 Colum. L. Rev. 221 (1941).

[146] "The most certain guide, no doubt, for the decision of such questions is a treaty or statute of this country." 159 U.S. at 163.

[147] "The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States . . . is within the scope of that power, and any conflicting law of the State must yield." 284 U.S. 30, 40 (1931).

[148] 273 U.S. 541 (1927).

[149] Nadelmann, *supra* note 141, at 344.

Those nations with which the United States has the strongest defense alliances and greatest volume of commercial intercourse should then be conferred with on a nation by nation basis to develop basic agreement on fundamental concepts which would support the drafting of future bilateral agreements.[150] In this manner, the multiplicity of varying legal systems and restrictions imposed by indigenous considerations inherent in a multilateral conference would be avoided. True, a variety of different agreements would result, with varying provisions in some of the agreements, but references to them and interpretations by the courts would be no more burdensome than the present labors of interpreting various sister state laws.

Once a preliminary agreement has been drafted with the accord of a particular country, each state should be given the opportunity to either accede to the agreement or decline acceptance of its terms. The United States Government could then negotiate the agreement with the nation concerned on behalf of those states who acceded to it. States desiring subsequent admission to the arrangement could file a note of intent with the federal government, which in turn would certify that state to the particular foreign country as a jurisdiction granting conclusive effect to valid civil judgments according to the terms of the agreement. In this manner, countries adhering to the reciprocity doctrine, whether the existence of reciprocity be determined by the courts or the executive branch, would give conclusive effect to the judgments of those states which desire to accede.

Such an approach would not encroach on the traditional functions of the judiciaries of the separate states in setting their own legal rules within the framework of constitutional validity.

B. *MILITARY LAW*

It is anomalous that the military services are vitally concerned with reducing complaints against service members for the nonsatisfaction of foreign money judgments, yet treat money judgments as little or no evidence of the validity of the claim on which the court actions were based.

The principal difficulty centers around the fact that once the judgment debtor returns to the United States for reassignment,

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[150] A model draft agreement devised by the 49th Conference of the International Law Association at Hamburg, West Germany, in 1960 is set forth in the Appendix. It is submitted on its face as a refutation of the argument that satisfactory bilateral agreements on the enforcement of foreign judgments cannot be drafted.

his foreign judgment creditor finds it impractical to pursue the matter by bringing an action in a court in the United States to reduce the foreign judgment to a domestic one. This is due principally to the state of the law in the United States concerning the efficacy of money judgments in domestic courts and the impracticalities inherent in view of the monetary sums involved. Thus, the majority of these cases result in correspondence complaints from the foreign judgment creditor to the commanding officer of the judgment debtor.

If commanders resort to disciplinary means as the method of resolving the problem, they must find some conduct on the part of the debtor which evinces a dishonorable failure to satisfy the judgment. The difficulty of gathering such evidence under circumstances where the witnesses are invariably abroad and the serviceman is in the United States are obvious. Further, assuming that the evidence is clear and can be produced, trial by deposition in these cases is no longer feasible.[151] The services are thus left with the expensive alternatives of returning the judgment debtor to the foreign station for trial, bringing witnesses to the United States, or leaving the matter to be a private one resolved by the parties. It is significant that no reported case exists wherein there was a court-martial conviction for dishonorable failure to pay debts based upon non-satisfaction of a foreign money judgment.

Administrative action against recalcitrant judgment debtors in the service also falls short of being the best possible means of resolving the problem. The same difficulties exist in gathering evidence for board proceedings as exist in taking disciplinary action. Further, board proceedings for elimination from the service on grounds of failure to satisfy valid judgments necessitate a showing of a pattern for shirking such obligations.[152] These cases do not constitute the majority of the situations in which service members fail to satisfy valid foreign money judgments. The individual who fails to satisfy three different judgments has left three injured judgment creditors in the wake of his overseas tour and may be constituting a pattern for shirking his financial responsibilities. The three service members who each fail to satisfy a foreign money judgment have left three injured parties uncompensated, but probably do not individually evince a pattern for shirking their debts which would satisfy administrative board

[151] United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960).
[152] Dep't of Defense Directive No. 1332.14 (Jan. 14, 1959).

proceedings. Nevertheless, in the aggregate, the consequences to our foreign relations are the same.

The means do not presently exist for the military services to cope in a practical manner with the problem of non-satisfaction of foreign money judgments against service members. The problem is a real one of direct consequence to our foreign relations and the efficient operation of our armed forces in overseas areas. A new approach to the entire problem is both warranted and possible.

The most effective and practical means of reducing complaints against service members for the non-satisfaction of foreign money judgements is through a program of preventative law in overseas commands. The military commander and his legal staff must educate the members of a command on the necessity of proper and responsible personal financial management. Service members should be encouraged to seek legal advice prior to entering into any foreign contractual arrangements. Prevention of civil disputes can become, to a large extent, an accomplished fact through a well conducted program of preventative law. The responsibilities of the military lawyer in such a program are obvious.

In those cases where civil disputes do arise, however, a new approach to civil actions against service members in overseas areas should be instituted. First of all, the services should take cognizance of these actions at the time they arise instead of waiting until after judgments have been rendered and complaints made by judgment creditors for non-satisfaction by service members. By treating civil actions against service members as strictly private affairs at the litigation stage, the services handicap themselves in the resolution of problems which arise subsequent to the litigation process.

Civil actions against service members in overseas commands should be reported to unit judge advocates as soon as notice of the actions are served upon the particular service members involved. The command judge advocate or legal officer should then determine the nature of the action.[153] If the action concerns contract or debt, the service defendant, his unit commander and the local judge advocate should then confer with a view to arriving

[153] Tort actions should not be treated in the same way as contract and debt actions. Most tort actions arise out of automobile accidents, in which instance service members are covered compulsorily by insurance. Cases involving tort claims arising out of criminal acts are punishable by courts-martial or local criminal process.

at an equitable settlement of the matter in a manner which will preclude litigation.[154] If the individual desires to litigate the matter, refuses to act at all, or denies the claim, he should be permitted to avail himself of any course of action he may choose. If he desires to settle the claim out of court, assistance should be given in arranging the settlement. A summary of this conference should be prepared by the judge advocate for insertion in the service records of the member. The summary should contain the nature of the pending action, the parties to it, the nature of the advice and counsel given to the service member and his plans, if any, for the resolution of the dispute.

If the matter reaches litigation, a judge advocate or legal officer should observe the trial and render a report on it in the same manner as is now practiced in observing and reporting on criminal trials in those foreign countries where local courts have criminal jurisdiction over American service personnel. It should continue to be the responsibility of the service member, however, to defray the expense of civilian counsel and all court costs. The duty of the trial observer would be to report on the basic fairness of the civil suit and determine if the service defendant has been accorded his substantial rights before the foreign court. The report should comment on the legality of the cause of action under the law of the foreign country, adequateness of notice and time permitted for retention of counsel and preparation of a case. A determination of the jurisdiction of the court over the persons and subject matter should also be made. The report should also specify whether or not the service member was represented by qualified counsel,[155] could understand the nature of the proceedings if they were conducted in a foreign language and was given the opportunity to present evidence in his behalf. Further, partiality or bias shown by the court should be reported on in detail. The report of the trial observer should also be inserted in the records of the service member. If it is concluded that the rights of the service member under the local law were safeguarded and he had a fair hearing, the foreign judgment could then be treated

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[154] The individual service member should be explained the nature and purpose of the conference and advised of his right to remain silent concerning the matter. In the event the member is tried for dishonorable failure to pay debts, the charge arising out of the subject matter of the conference, his rights under Article 31, Uniform Code of Military Justice, must be observed at all stages.

[155] American consulates retain lists of local English speaking attorneys. These lists are available to military personnel and can be supplemented through coordinated effort with local bar organizations.

by the services as conclusive evidence of the validity of the underlying obligation on which it was rendered.

In addition to the present administrative and disciplinary courses of action available against service members who dishonorably fail to satisfy just obligations or evince a pattern for shirking them, the services could frame new regulations instituting further adminsitrative action in those cases which are not now proper ones for existing remedies. Specifically, in those cases where the service member has not evinced a pattern for shirking these responsibilities and there is little, if any, possibility of gathering sufficient evidence for disciplinary action, resort should be had to a new administrative procedure.

Once a complaint has been received that a service member has not satisfied a foreign judgment under these circumstances, the immediate commander should inquire into the case. If the service member does not devise a means of satisfying the judgment either wholly or on a satisfactory installment basis, within a 30-day period, the case should be referred to an administrative board. The board should consider the report of the trial observer concerning the initial litigation and the summary of the initial conference on the matter between the individual, his unit commander and the judge advocate or legal officer. In the absence of a determination by the trial observer that the trial was legally objectionable or unfair, the foreign judgment should be given conclusive effect. The service member should not be permitted to question the judgment on its merits, but should be permitted to show satisfaction, a program for satisfaction presently in effect, an appellate decision negating the judgment of the trial court, a domestic judgment negating the effect of the foreign judgment, or newly discovered evidence of fraud which was not decided upon by the original trial court or foreign appellate court. In the absence of any of these defenses, the individual should be recommended for administrative separation from the service or retention on condition that the judgment be satisfied within a period of time based upon his ability to pay and the amount of the judgment involved.[156]

It is believed that the procedures outlined in these recommendations afford service judgment debtors ample opportunity to dispose of foreign money judgment obligations in a manner not inconsistent with their rights and abilities. The influence of such

[156] All references to the foreign civil action should be deleted from the service member's records upon a satisfactory showing of final settlement of the civil dispute.

procedures should result in a reduction of complaints for non-satisfaction of foreign judgments and bring about a greater number of satisfactions when complaints are made. Adoption of these procedures would not be an invasion of the civil law arena by the military services, but rather, a means of protecting the good relations of the United States and the credit rating of the deserving members of the military services in foreign countries.

The efficient and successful operations of our military forces in overseas area depend to a great extent on the climate of welcome and cooperation existing in friendly host countries. Regard for the laws and legal institutions of our friends and allies is necessary to cement the relationships which are, in essence, the true strength of the free world. Evasion of the valid court judgments of host nations will only serve to weaken and sap this strength.

The military lawyer is directly engaged in the struggle to establish a world peace within the framework of law. His dual profession of arms and the law places him in a position of responsibility demanding understanding of the legal problems which affect our world relations and challenge him to devise equitable solutions for the achievement of international harmony. Solution to the problem of recognition and enforcement of valid foreign judgments can be another step toward realizing a world order of peace through law.

VII. APPENDIX
HAMBURG MODEL ACT RESPECTING THE RECOGNITION OF FOREIGN (MONEY) JUDGMENTS

Article I

This Act may be cited as The Foreign (Money) Judgments Act.

Article II

This Act applies to the recognition of judgments in civil and commercial matters.

Article III

In this Act:

(a) "Foreign judgment" means a final judgment, decree or order or part thereof, made by a court of a foreign state whereby a definite sum of money is made payable, but does not include a sum made payable in respect of a tax or penalty;

(b) "final judgment" means one that is capable of being enforced in the state of the original court although these may still be open to an appeal or other method of attack in that state;

(c) "original court" means the court by which the foreign judgment was given;

(d) "forum" means the court in which it is sought to enforce the foreign judgment;

(e) "judgment debtor" means the party against whom the foreign judgment was given.

Article IV

A foreign judgment is recognized by the forum as conclusive and is enforceable between the parties and may be relied upon as a defense or counterclaim except where:

(a) the original court lacked jurisdiction under Section 5; or

(b) the foreign judgment was given by default and the forum is satisfied that the judgment debtor, being the defendant, did not have notice of the proceedings in the original court in sufficient time to enable him to defend and did not appear; or

(c) the original court denied natural justice, that is the foreign judgment was not rendered by an impartial tribunal or under a procedural system compatible with the requirement of due process of law; or

(d) the foreign judgment is based upon a cause of action which is contrary to the strong public policy (order public international) of the forum; or

(e) the foreign judgment is based upon a cause of action which has formed the subject of another judgment between the same parties recognized as res judicata under the law of the forum; or

(f) the foreign judgment has been found by the forum to have been obtained by fraud.

Article V

For the purposes of this Act the original court has jurisdiction when:

(a) the judgment debtor has voluntarily appeared in the proceedings for the purpose of contesting the merits and not solely for the purpose of

(i) contesting the jurisdiction of the original court, or

(ii) protecting his property from seizure or obtaining the release of seized property, or

(iii) protecting his property on the ground that in the future it may be placed in jeopardy of seizure on the strength of the judgment, or

(b) the judgment debtor has submitted to the jurisdiction of the original court by an express agreement; or

(c) the judgment debtor at the time of the institution of the proceeding ordinarily resides in the state of the original court; or

(d) the judgment debtor instituted the proceeding as plaintiff or counterclaimed in the state of the original court; or

(e) the judgment debtor, being a corporate body, was incorporated or has its seat (siege) in the state of the original court, or at the time of the institution of the proceeding there had its place of central administration or principal place of business there; or

(f) The judgment debtor, at the time of the institution of the proceeding, has either a commercial establishment or a branch office in the state of the original court and the proceeding is based upon a cause of action arising out of the business carried on there; or

(g) in an action based on contract the parties to the contract ordinarily reside in different states and all, or substantially all, of the performance by the judgment debtor was to take place in the state of the original court; or

(h) in an action in tort (delit or quasi-delit) either the place where the defendant did the act which caused the injury, or the place where the last event necessary to make the defendant liable for the alleged tort (delit or quasi-delit) occurred, is in the state of the original court.

Notwithstanding anything in subsection (i), the original court has no jurisdiction:

(a) in the cases stated in clauses (c), (e), (f), and (g) if the bringing of proceedings in the original court was contrary to an express agreement between the parties under which the dispute in question was to be settled otherwise than by a proceeding in that court;

(b) if by the law of the forum exclusive jurisdiction over the subject matter of the action is assigned to another court.

Article VI

The bases for jurisdiction recognized in Section 5 are not exclusive and the forum may accept additional bases.

Article VII

The forum shall, on terms that it thinks just, adjourn the hearing concerning the recognition of a foreign judgment when an appeal or other method of attack has been taken in the state of the original court, and may adjourn the hearing to allow the judgment debtor a reasonable opportunity for taking such action.

PRETRIAL ADVICE OF THE STAFF JUDGE ADVOCATE OR LEGAL OFFICER UNDER ARTICLE 34, UNIFORM CODE OF MILITARY JUSTICE*

BY LIEUTENANT COLONEL ROBERT K. WEAVER**

I. INTRODUCTION

The proper selection of cases to be tried by general court-martial is an important step in the administration of military justice. This selection can be made only after the staff judge advocate or legal officer has made a careful, impartial, independent and professional review of the report of investigation made under Article 32(b) of the Uniform Code of Military Justice,[1] and the accompanying papers. Careful analysis and mature, independent recommendations woven into a persuasive pretrial advice will assist the convening authority in the discharge of his judicial function of determining whether charges should be referred for trial by general court-martial. Although the responsibility is that of the officer exercising general court-martial jurisdiction, he should, and normally does, give considerable weight to the professional opinions and recommendations of his legal advisor. For this reason the staff judge advocate must accept some responsibility in attempting to predict the probable outcome of a given case. While it is recognized that it is difficult to predict how a court-martial may resolve conflicting evidence, the conflicts can be made known. This assumes that a thorough impartial investigation has been accomplished. A careful analysis will give the convening authority an informed and considered estimate of the situation, including a survey of the expected evidence, legal issues and matters affecting possible punishment. Improvements in the pretrial advice will usually result in a de-

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] The Uniform Code of Military Justice (hereinafter referred to as the Code or UCMJ and cited as UCMJ, art. ___) was enacted by the Act of May 5, 1950, ch. 169, § 4, 64 Stat. 108 (effective May 31, 1951). It was re-enacted in 1956 as 10 U.S.C. §§ 801–940. Act of August 10, 1956, ch. 1041, § 4, 70A Stat. 1, 36–79 (effective January 1, 1957).

mand for higher standards in future pretrial investigations. Another matter of concern to all judge advocates is that frequently the convening authority, having made a decision to refer charges to trial by general court-martial, is unable to comprehend why the court did not convict the accused, or having done so, did not adjudge a punishment commensurate with what the convening authority believes to be appropriate. This type of situation is fraught with danger as to unlawful command influence. Too frequently the convening authority is acting or at least proceeding without proper appreciation for the function and responsibility of the court and also under a lack of understanding of his proper judicial responsibility. Obviously, the relatively few hours of legal instruction received by commanders at the various service schools are insufficient to acquaint them with these matters. As a result, if the commander is going to be made aware of the legal requirements, it must be from his staff judge advocate or legal officer.

This article examines the legal requirements for the pretrial advice and presents some suggestions as to the preparation of the formal pretrial advice. Although directed primarily at those officers who are inexperienced in this legal area, it will refresh the recollection of and possibly stimulate reflection by the experienced staff judge advocate. In addition, the concepts set forth may be of utility to personnel engaged in the trial of cases.

II. STATUTORY PROVISIONS

The sweeping changes made by the Uniform Code of Military Justice in other areas of the law have obscured the importance of the pretrial advice of the staff judge advocate. Certainly, a good start is as necessary for a court-martial as it is for a competitive sport or a "best seller." A truly professional examination of the pretrial proceedings is required. This has been recognized for many years. Even prior to World War I some convening authorities referred court-martial charges to their staff judge advocates before directing trial by general court-martial. In 1919 the Judge Advocate General of the Army recommended that this referral to the staff judge advocate be mandatory.[2] Later, this provision was included in Article of War 70, which provided in part:

[2] This recommendation was adopted and embodied in Gen. Orders No. 88, Dep't of War (1919), and in MCM, U.S. Army, 1917, Change No. 5 (July 14, 1919).

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.[3]

Congress expanded this principle in 1948. Thus, Article of War 47(b) stated in part:

Before directing the trial of any charge by general court-martial, the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in the preceding article,[4] that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation.[5]

The present provision is found in Article 34 of the Code which provides:

(*a*) Before directing trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority shall not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under this code and is warranted by the evidence indicated in the report of investigation.

(*b*) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the

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[3] Army Reorganization Act of June 4, 1920, ch. II, 41 Stat. 787.

[4] The first statutory provision for a pretrial investigation of the type known today was contained in Article of War 70, note 3 *supra*, which provided in part that: "No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides."

Title II of the act of 24 June 1948, ch. 625, § 201 *et seq.*, 62 Stat. 627, made some changes which were included in Article of War 46(b). The major changes were that the limitation as to reference for trial was restricted to trial by general court-martial and that the accused was entitled at his request to be represented by counsel of his own selection, civil or military, or by counsel appointed by the officer exercising general court-martial jurisdiction. The present provision is contained in UCMJ, art. 32, and, insofar as the accused is concerned, contains the same basic rights. However, the United States Court of Military Appeals has interpreted Article 32 liberally in holding that an accused is entitled as a matter of right to be represented by military counsel who is certified under UCMJ, art. 27(b), which means that, for all practical purposes, the accused is entitled to be represented by a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State, and who has been certified as competent to perform the duties of trial and defense counsel before a general court-martial. See United States v. Tomaszewski, 8 USCMA 266, 24 CMR 76 (1957).

[5] Act of 24 June 1948, ch. 625, § 223, 62 Stat. 634.

investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made.[6]

Unfortunately, in some commands investigating officers treated the pretrial investigation as a mere formality and some judge advocates considered the pretrial advice in a like manner.[7] Theoretically, the convening authority determined whether to refer the charges for trial by general court-martial. Actually, some convening authorities delegated this authority to their staff judge advocates both before and after the effective date of the Uniform Code of Military Justice.[8] In some commands an enlisted clerk prepared the short pretrial advice, which frequently was made after the trial was completed. Often the advice was a mimeographed statement to the effect that the investigation of the charges was made in substantial compliance with the statute, that the charges were in proper form, were warranted by the evidence, and that trial by general court-martial was recommended.[9] Although such short form advice might, under some circumstances, meet the minimum requirements of Article 34(a), UCMJ, it does not carry out the spirit of the law and undoubtedly leads to abuses, either real or fancied.[10] Certainly, it is of no

[6] UCMJ, art. 34.

[7] Such perfunctory treatment still exists. See United States v. Huff, 11 USCMA 397, 29 CMR 213 (1960); United States v. Foti, 12 USCMA 303, 30 CMR 303 (1961).

[8] See Judge Adv. Gen. School, U.S. Dep't of Army, *Report of Conference Proceedings*, Army Judge Advocates Conference 62–63 (1952). The report contains an "SOP" for the VII United States Army Corps, dated 17 February 1951, under which the convening authority delegated to his staff judge advocate the authority to refer cases for trial except those involving females, officers, civilans, undue publicity, exclusion of the public, and those involving unusual questions of law or policy. This SOP was based upon an article in the December issue of the 1950 *Military Review* and probably represented the practice at that time. In some commands this unlawful practice continued and instances are recorded as late as 1955. Thus, in United States v. Roberts, 7 USCMA 322, 22 CMR 112 (1956), a convening authority submitted a statement wherein he acknowledged that he personally had delegated to his staff judge advocate the authority to refer cases for trial by general court-martial and that his staff judge advocate had made the decision to do so in that case. A similar attempt was made in United States v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1955), to establish the fact of such delegation. To assure that the convening authority does not delegate this responsibility to his staff judge advocate, all Army staff judge advocates have been advised that the preferred practice is that the convening authority "indicate his personal concurrence or nonconcurrence in the advice by an appropriate notation thereon followed by his signature or initials in each case." JAGJ 1961/8685, (Nov. 15, 1961), in U.S. Dep't of Army, Pamphlet No. 27–101–83, p. 6 (1961) (Judge Advocate Legal Service).

[9] See CM 396449, Richmond, 24 CMR 322 (1957).

[10] See CM 404027, Feron, 29 CMR 627 (1960); and see also United States v. Foti, *supra* note 7. Judge Ferguson's comment in his separate opinion in *Foti*

assistance to a convening authority, who has little time to read and no time to examine the report of investigation. Thus, the staff judge advocate can make a worthwhile contribution to justice through his impartial, thorough and professional advice. In 1954 Judge Latimer candidly stated:

> If we look the facts in the face, we must realize that presently the staff judge advocate is the officer who is suspected of being a messenger of conviction. He is always pictured as the *alter ego* of the commander.[11]

Admittedly, improvement has been made since then. However, changes evolve slowly and the necessity to rotate judge advocates in various legal positions may result in the assignment of an officer with little or no experience in military justice as a staff judge advocate. The present study is an attempt to review the statutory duties of the staff judge advocate or legal officer with respect to the pretrial advice and to present recommendations which may assist these officers and the convening authority in performing their statutory duties.

Before examining the nature and content of the pretrial advice, it would be appropriate to consider who determines whether the charge alleges an offense and is warranted by the evidence indicated in the report of investigation conducted under the provisions of Article 32, Uniform Code of Military Justice. In order to place this in the proper perspective, the previous statutory language must be examined.[12] The provisions of Article of War 47(b), contained in the act of 24 June 1948, did not specify who had the responsibility. However, many Army judge advocates

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is quite revealing. He stated that "a mimeographed form . . . does not fulfill the requirements of Code, supra, Article 34, ... I do not understand my brothers to disagree with me in this conclusion, although they indicate that minimal information may sometimes suffice." 12 USCMA at 306, 30 CMR at 306. In United States v. Brown, 13 USCMA 11, 32 CMR 11 (1962), the Court reiterated by stating, "Certainly, there can be no quarrel but the convening authority is in a preferred position to take enlightened pretrial action when he is fully informed in the premises. And particularly should he be apprised of factors that may have a substantial influence on his decision. This Court so stated in *Foti* and we reaffirm that position." 13 USCMA at 12, 32 CMR at 12. Although the Court held in *Brown* that the pretrial advice in question was legally sufficient, the sufficiency thereof was predicated upon references to the report of investigation, specifications and limits of punishment and thus the convening authority "did not consider a sixteen-line advice in a vacuum, but rather, it appears that the challenged advice was submitted . . . with a file containing the items and information the defense complains the advisor omitted from the pretrial review." Accordingly, it is concluded that there has been no retreat by the Court from its previous comments in *Foti*.

[11] Latimer, *Improvements and Suggested Improvements in the Administration of Military Justice*, in *Report of Conference Proceedings*, *supra* note 8, at 49, 54 (1954).

[12] See text accompanying notes 3, 5, and 6, *supra*.

believed that such responsibility was a function of the staff judge advocate. Thus, it was stated:

> * * * By virtue of the amendment in Article 47(*b*), which requires that no charge will be referred to a general court for trial unless the prerequisites therein stated were complied with, the discretionary powers of the convening authority are substantially curtailed in this respect and the findings of the staff judge advocate, i.e., his advice and recommended action, assume greater influence, force and effect.
>
> Although Article 47(*b*) does not expressly or directly confer upon the staff judge advocate the function of making the prescribed findings, it is quite obvious and only reasonable to infer that such being a legal function it necessarily devolves upon the staff judge advocate. * * *[13]

The language of Article of War 47(b) was preserved in the proposed Article 34, Uniform Code of Military Justice. However, the Congressional hearings make it clear that the *convening authority* makes the determination of whether an offense is alleged and is warranted by the evidence indicated in the report of investigation.[14] The proposed language was made more definite by the use of the phrase, "he was found," rather than the previous phrase, "it has been found." Professor Morgan explained this to the Senate Subcommittee by saying:

> When the investigation is completed, if it is to be used as a basis for a trial, the investigation goes to the convening authority. The convening authority must consult with his staff judge advocate before he orders a trial. It does not mean that he must necessarily follow the advice of the staff judge advocate. He may disagree with him, but he has to take the staff judge advocate's advice before he orders it for trial, and has to be convinced that an offense has been committed, and that there is a good case against the accused on the evidence that is indicated, although it may not be fully set forth in the investigation.[15]

The United States Court of Military Appeals also adopted this position.[16]

The convening authority is not guided by anything in the Code as to the standard which he should use when he determines whether the evidence warrants trial. However, the Congressional hearings indicate that a *prima facie* standard is to be used. One witness recommended that the proposed statutory language be changed so that the convening authority would be required to

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[13] Office of the Judge Adv. Gen., U.S. Dep't of Army, *Seminars Presented During the Orientation Conference on the Manual for Courts-Martial, 1949*, p. 131 (1948).

[14] *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 910–911 and 1006–1009 (1949).

[15] *Hearings on S.857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. 39 (1949).

[16] United States v. Bunting, 4 USCMA 84, 15 CMR 84 (1954); United States v. Williams, 6 USCMA 243, 19 CMR 369 (1955); see also United States v. Schuller, 5 USCMA 101, 17 CMR 101 (1954).

determine that the charges were warranted "by evidence beyond a reasonable doubt indicated in the report of investigation" before he directed trial.[17] Congress did not adopt this suggestion. In 1953 a Navy board of review approved the *prima facie* standard. The board remarked that the convening authority only had to find:

> . . . [T]hat the evidence is probably sufficient to show that an offense has been committed and the evidence shows that the accused probably committed the offense.[18]

The United States Court of Military Appeals has accepted this standard. It said that when the convening authority refers a case to trial he:

> . . . [A]cts in a capacity similar to that of a grand jury. The sole question for his determination at that stage is whether or not there is probable cause to believe the accused is guilty of the crime charged. The convening authority only refers the case to a court-martial for a determination of that question by the fact finders.[19]

III. GENERAL CONTENT OF PRETRIAL ADVICE

Although the convening authority must determine whether the charge alleges an offense and is warranted by the evidence contained in the report of investigation, he should, and usually does, rely upon the advice and recommendation of his staff judge advocate or legal officer. Unfortunately, the Code give the staff judge advocate no guidance as to what information he should include in his "advice and consideration." The 1951 Manual for Courts-Martial gives limited assistance by providing:

> The advice of the staff judge advocate or legal officer shall include a written and signed statement as to his findings with respect to whether there has been substantial compliance with the provision of Article 32, whether each specification alleges an offense under the code, and whether the allegation of each offense is warranted by the evidence indicated in the report of investigation; it shall also include a signed recommendation of the action to be taken by the convening authority. Such recommendation will accompany the charges if they are referred for trial. See 44*g*(1) & *h*.[20]

Subject to the above quotation, the Manual also provides that:

> * * * [R]eference to a staff judge advocate or legal officer will be made and his advice submitted in such manner and form as the convening authority may direct, but the convening authority shall at all times

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[17] *Hearings on H.R. 2498, supra* note 14, at 712–13.

[18] NCM 276, Yuille, 14 CMR 450 (1953).

[19] United States v. Moffett, 10 USCMA 169, 27 CMR 243 (1959).

[20] U.S. Dep't of Defense, Manual for Courts-Martial, United States, 1951, para. 35*c* (hereinafter referred to as the Manual or MCM, 1951, and cited as MCM, 1951, para. ___).

communicate directly and personally with his staff judge advocate or legal officer in matters relating to the administration of military justice.[21]

The Manual's provision is supplemented by the drafter's comment:

Although not required by the Code or the Manual, the advice of the staff judge advocate or legal officer should list the elements of any offense that is to be referred to trial if a detailed statement of the elements of proof of that offense is not in the Manual. Such a listing, for example, would be appropriate as to any offense under Article 133 and as to many offenses under Article 134. Similarly, if the trial will involve a question of law the solution to which is not to be found in the Manual (e.g., entrapment), the advice may well contain a brief statement of the law in point. Such information will aid the trial counsel in presenting correct proposed instructions if the law officer calls for such instructions. An alternate solution is to include such information in a separate memorandum addressed to the trial counsel.[22]

The general provisions of the 1951 Manual relating to the advice were contained previously in paragraph 35*b* of the 1949 Army Manual. The 1928 Army Manual included no significant information as to the advice. However, the 1921 Army Manual detailed the contents of the staff judge advocate's advice as follows:

When the charges are returned by the staff judge advocate to the convening authority he will in writing over his signature (or over the signature of an assistant staff judge advocate, with an indication of approval or disapproval and any further comment or recommendations, signed by the staff judge advocate) advise the latter (1) whether or not they are correct and complete in form, and (2) appropriate to the indicated competent evidence in the case; (3) whether or not, in his opinion, a prima facie case, justifying trial or other proceedings, exists; (4) whether each specification states an offense cognizable by court-martial; (5) whether the indicated competent evidence justifies trial on each of the several specifications and charges, and, if not on all, then on which ones; (6) whether any, and if so what part, of the evidence, contained

[21] MCM, 1951, para. 35*b*. The requirement for direct and personal communication between the staff judge advocate and the convening authority on military justice matters is practically a direct quotation from UCMJ, art. 6(b). The manner of reference of the charges to the staff judge advocate is a matter of local policy. Usually this consists of an informal routing to the staff judge advocate as soon as the charges are received at the headquarters of the convening authority. In some commands, the charges and report of investigation are delivered directly to the staff judge advocate from the subordinate commands. Theoretically, the convening authority could examine the charges and report of investigation before the staff judge advocate prepares his advice. Practically, the convening authority rarely sees the charges and report of investigation until the advice of the staff judge advocate is submitted to him.

[22] U.S. Dep't of Defense, Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 141. This comment was cited with approval in CM 365145, Haimson, 14 CMR 268 (1954), *aff'd*, United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954).

in the summaries of the statements of the witnesses or documents or other evidence submitted is incompetent or improper to be introduced as evidence at the trial for any reason; (7) whether, in view of the report, if any, of the medical officer to the investigating officer, or on any other grounds, there is reason to believe that the accused may be mentally defective or deranged, either temporarily or permanently; (8) the age of the accused; and will recommend the disposition which he believes should be made of the case, including particularly whether it should be:

1. Dismissed without trial or further proceedings;
2. Disposed of under the one hundred and fourth article of war;
3. Referred for trial to a summary court-martial;
4. Referred for trial to a special court-martial (either under the second proviso to A.W .12, or otherwise);
5. Referred for trial to a general court-martial (or to a military commission);
6. Disposed of by taking proper steps looking to the discharge of the accused, if an enlisted man, under the provisions of Army Regulations, in case of indicated mental defect or derangement, or in other proper cases; or if the accused be an officer or person subject to military law other than a soldier, by taking proper steps looking to his dismissal, dropping from the rolls, or other proper procedure; and also
7. Whether a medical board should be convened under the provisions of paragraph 76c; and
8. Whether the charges should be retained for further investigation, or pending the recovery of the accused from illness or from temporary mental derangement, or for any other purpose; or
9. The accused should be surrendered for trial to the civil authorities, or the case disposed of in any other manner than in one of the ways above mentioned; and
10. In case he recommends separation of the accused from the service without trial, on account of indicated mental defect or derangement, whether (and if so, what) relatives or civil authorities should be advised.

He will also submit a form of order designed to carry his recommendations into effect.[23]

In addition, the 1921 Manual authorized the convening authority to appoint a medical board in any case and required such appointment if there was reason to believe that the accused was mentally defective. The extent of the examination and investigation by the medical board was quite detailed and upon receipt of the report the convening authority was required to refer it to his

[23] MCM, U.S. Army, 1921, para. 76*b*, at pp. 67–68.

staff judge advocate for consideration and advice in connection with the other papers in the case.[24]

IV. PREPARATION OF AND RESPONSIBILITY FOR THE PRETRIAL ADVICE

As a matter of practice, the advice usually is drafted by an officer subordinate to the staff judge advocate. This situation is similar to that of post trial reviews. Under Article 61 of the Code the convening authority must refer the record of trial of each general court-martial to his staff judge advocate or legal officer, who submits a written review and opinion thereon to the convening authority. With respect to this Article the Court of Military Appeals remarked:

> As we interpret the above-quoted language of the Article, in the light of the many and varied duties of a staff judge advocate, we are satisfied Congress did not intend to saddle him with the impracticable task of personally reading every page of the record in all cases and composing every review. Rather, it is our conviction that Congress was looking toward an ultimate objective with practicability in mind, and while it was interested in insuring that a seasoned legal officer would familiarize himself with the record so that he could pass judgment on the factual and legal issues raised, and properly advise the convening authority on the action to be taken, it was not concerned with the method used in learning the contents of the record. The important matter to all parties concerned is that the staff judge advocate know the facts and legal issues so he can determine whether the accused has been denied military due process, and it would be elevating form over substance to hold that he may acquire that knowledge only by personally reading every page of the record. Furthermore, we see no reason why he must be the architect of the original draft of the review. It would appear to us that he meets all codal requirements if, after being made fully aware of all matters touching on pretrial rights and privileges and the findings and sentence, he ascertains that the review in its final form meets legal standards and accurately reflects his personal opinion on matters to be contained therein.
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> * * * He has been furnished a staff to aid him in his work and if every detail required in the proper administration of military justice had to be personalized, he would be denied the effective assistance of skilled subordinates.[25]

[24] MCM, U.S. Army, 1921, para. 76c, at pp. 68–71.

[25] United States v. Kema, 10 USCMA 272, 274, 27 CMR 346, 348 (1959). The staff judge advocate had not read the record of trial but relied upon the summary and draft review prepared by another officer. See also United States v. Callahan, 10 USCMA 156, 27 CMR 230 (1959), and cases cited therein, on the rule that the staff judge advocate may have the assistance of another staff member in preparing the review. However, mere concurrence in a review prepared by another officer disqualified to perform this duty is not compliance with the requirement for an impartial review. United States v. Crunk, 4 USCMA 290, 15 CMR 290 (1954). Apparently, if there is any disqualification by the drafter, there must be some indication that the staff judge advocate made a complete and independent review. United States v. Hardy, 11 USCMA 521, 29 CMR 337 (1960).

Because of the similarity between the provisions of Article 61 and Article 34 of the Code, it is reasonable to conclude that the staff judge advocate need not personally prepare the pretrial advice. However, this does not mean that anyone may prepare it. The Code provides:

> No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case, shall subsequently act as a staff judge advocate or legal officer to any reviewing authority upon the same case.[26]

Thus, an officer who represented the accused at a pretrial investigation and at the taking of the deposition of a key prosecution witness may not subsequently prepare the pretrial advice, even though it might be adopted and signed by the staff judge advocate. The breach of the attorney-client relationship and assistance given the staff judge advocate invalidates both the advice and the subsequent proceedings.[27] Similarly, a legal assistance officer who had entered into an attorney-client relationship with the accused cannot later prepare and sign the pretrial advice because Article 6(c) of the Code applies to pretrial as well as post trial proceedings.[28]

Quite frequently it is necessary for a judge advocate to give information and guidance to the investigating officer appointed under Article 32(b), UCMJ. Such guidance would not preclude the judge advocate from later preparing or signing the pretrial advice. One board of review concluded that the giving of such guidance did not constitute the judge advocate an investigating officer within the prohibition of Article 27(b), UCMJ, which prohibits an investigating officer from subsequently acting as trial counsel.[29] In construing former Article of War 47, the Court of Military Appeals held that a staff judge advocate who gave advice to the investigating officer did not thereby become an investigating officer himself and thus, was not disqualified from reviewing the record of trial prior to action on the record by the convening authority. The Court noted that the guidance given by the staff judge advocate to the investigating officer

[26] UCMJ, art. 6(c).

[27] CM 381155, Dunston, 19 CMR 537 (1955).

[28] ACM 13978, Powell, 24 CMR 835 (1957).

[29] ACM 11080, Bohannon, 20 CMR 870 (1955). See also CM 362083, Goff, 10 CMR 255 (1953), *pet. denied*, 3 USCMA 816, 11 CMR 248 (1953), where the Chief of the Trial Section signed the charges as accuser and later prepared the pretrial advice for the signature of the staff judge advocate and later gave advice and guidance to the investigating officer. The decision is questionble because of the use of a short form advice and also because the board relied upon the mere signature of the staff judge advocate to conclude that the advice was the independent act of the staff judge advocate.

"minimizes the risk of error arising from faulty pretrial investigations, and appreciably reduces the preference of ill-founded charges against those subject to military law." [30]

It should be apparent that the staff judge advocate's participation in the pretrial investigation should be limited to advice and guidance. Personal, independent investigation of the facts by the staff judge advocate would disqualify him from later acting as staff judge advocate. Naturally, the foregoing comment applies not only to the staff judge advocate but also to a subordinate who may actually prepare the pretrial advice. In this regard, it is recommended that the advice indicate the name and position of the assistant who drafted the document. Although the author acknowledges that in many commands the appointed defense personnel will know the identity of the drafter, there appears to be no legitimate reason to conceal his identity. Further, it is believed that such disclosure will eliminate possible appellate problems and will avoid the unseemly situation reflected in *United States v. Hardy*.[31]

Although the staff judge advocate need not personally prepare the advice, "the responsibility for the advice is that of the person occupying the office at the time it is signed." [32] In the *Schuller* case, the Court of Military Appeals criticized a senior judge advocate who signed an advice prepared by another officer, without reading or checking the file, or knowing anything about the expected evidence. According to the Court, such action:

> . . . [D]eprived the accused of his right to have a qualified Staff Judge Advocate make an independent and professional examination of the expected evidence and submit to the convening authority his impartial opinion as to whether it supported the charge.[33]

The phrase, "person occupying the office at the time it is signed," would include not only the individual officially designated as staff judge advocate but also an acting staff judge advocate, *i.e.*, one who is occupying that position in the temporary absence of the designated officer.[34] In addition, an officer may be designated as staff judge advocate with respect to a particular case.

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[30] United States v. DeAnglis, 3 USCMA 298, 12 CMR 54 (1953). See also United States v. Hayes, 7 USCMA 477, 22 CMR 267 (1957), which arose under the UCMJ with the same result. The Court also indicated that an officer who submitted the pretrial advice to the convening authority would not thereafter be disqualified from serving as trial counsel.

[31] 11 USCMA 521, 29 CMR 337 (1960), *as modified*, 12 USCMA 513, 31 CMR 99 (1961).

[32] United States v. Schuller, 5 USCMA 101, 17 CMR 101 (1954).

[33] *Id.* at 105, 17 CMR at 105.

[34] United States v. Schuller, *supra* note 32.

Any officer who is certified under the provision of Article 27(b), UCMJ, is legally competent to do this.[35]

V. FORM OF PRETRIAL ADVICE

Although the Code is silent as to the form and content of the pretrial advice, the Manual requires that it be written and signed.[36] However, the failure to render a written, signed advice is not necessarily prejudicial to the substantial rights of the accused, and if no objection is made at the trial, the defect is waived and may not be raised upon appeal.[37] The Court arrived at this result because (1) the pretrial advice must accompany the charges when they are referred to trial,[38] (2) the defense counsel is permitted to examine any paper accompanying the charges, including the pretrial advice,[39] (3) a motion for appropriate relief would lie if there were any substantial defect as to the pretrial advice,[40] and (4) a defect in the pretrial proceedings is generally waived if not asserted prior to entry of the plea.[41] In the *Allen* case it was contended unsuccessfully that the accused was prejudiced because the charges were referred to trial one day before the date of the pretrial advice.[42] In another case, the Court inferentially held that charges referred for trial after an oral advice could properly be tried by a general court-martial.[43]

From the foregoing, it is clear that the pretrial advice should be written and a copy thereof included in the copy of the file given to the accused's counsel.[44] While no doubt it is permissible to supplement the written advice orally, the author recommends that oral comments which introduce new matter or are at a vari-

[35] United States v. King, 8 USCMA 392, 24 CMR 202 (1957). Article 27(b), UCMJ, provides: "Any person who is appointed as trial counsel or defense counsel in the case of a general court-martial—(1) shall be a judge advocate of the Army or the Air Force, or a law specialist of the Navy or Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or shall be a person who is a member of the bar of a Federal court or of the highest court of a State; and (2) shall be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member."

[36] MCM, 1951, para. 35*c*.

[37] United States v. Heaney, 9 USCMA 6, 28 CMR 268 (1958).

[38] MCM, 1951, para. 35*c*.

[39] MCM, 1951, para. 44*h;* United States v. Beatty, 10 USCMA 311, 27 CMR 385 (1959).

[40] MCM, 1951, para. 69*c*.

[41] MCM, 1951, para. 69*a;* United States v. Allen, 5 USCMA 626, 18 CMR 250 (1955).

[42] United States v. Allen, *supra* note 41.

[43] United States v. Roberts, 7 USCMA 322, 22 CMR 112 (1956).

[44] Under some circumstances, the failure to do so may not be prejudicial. United States v. Beatty, 10 USCMA 311, 27 CMR 385.

ance with the written advice be made a matter of record. This is a matter of fundamental fairness and carries out the spirit of paragraph 44*h* of the Manual which permits the defense counsel to examine the pretrial advice. If such a course were followed, the defense counsel would have complete information and a possible defect in the pretrial proceedings would be avoided. In an appropriate case, a law officer in his discretion might require a complete disclosure by the staff judge advocate of any oral advice given to the convening authority. To avoid this situation, the staff judge advocate should prepare the advice so that oral additions are unnecessary.

VI. RECOMMENDED CONTENT OF THE PRETRIAL ADVICE

At present a staff judge advocate has but few guide lines as to the content of the pretrial advice. It is clear that he must consider the charges and advise the convening authority concerning the latter's duty of determining whether the charge alleges an offense and is warranted by the evidence in the report of investigation.[45] The advice should include his written conclusions as to whether there has been substantial compliance with Article 32, UCMJ, together with a recommended action.[46] The Manual's provisions are not exclusive. This is indicated by the drafter's comment that if the Manual does not include the elements of the offense, the advice should and may include any unusual points of law.[47] The advice should reflect the staff judge advocate's independent, professional examination of the expected evidence and his impartial opinion;[48] it should be complete, considered and accurate.[49] It also involves individual treatment of each case and inclusion of factors which may substantially influence the convening authority's decision or discretion.[50]

It is not the function of the boards of review or the Court of Military Appeals to establish rigid rules as to the pretrial advice. On the contrary, they have been concerned with whether a particular advice on a certain set of facts and circumstances meets *minimal* legal standards or is so deficient as to prejudice the substantial rights of the accused. However, staff judge advocates

[45] UCMJ, art. 34(a); MCM, 1951, para. 35*c*.
[46] MCM, 1951, para. 35*c*.
[47] U.S. Dep't of Defense, Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 141.
[48] United States v. Schuller, *supra* note 32.
[49] United States v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1955).
[50] United States v. Foti, 12 USCMA 303, 30 CMR 303 (1961).

should not be content merely to achieve *minimum* standards but rather should strive to improve all facets of the administration of military justice. This author believes that a careful, impartial and professional review of the report of investigation and accompanying papers when set forth in a well conceived pretrial advice will tend to do this. Few staff judge advocates would attempt to advise their commander that "the investigation of the charges was *not* made in compliance with Article 32, that the charges were *not* in proper form, were *not* warranted by the evidence, and that trial was *not* recommended" without providing the commander with the bases for such opinions. The convening authority, although he is a layman, is required by law to exercise a variety of *judicial functions* which cannot be delegated. The proper and enlightened discharge of these judicial functions necessarily involves an appreciation of the facts and circumstances of the case and the legal rules which are applicable. In the remainder of this article, the author sets forth, except where otherwise noted, his personal recommendations as to the form and content of the pretrial advice. These recommendations are not based upon *minimal* legal standards but are designed to assure not only technical compliance with Article 34, but also a higher quality of endeavor by the staff judge advocate, a knowledgeable discharge of judicial functions by the convening authority and, in general, an overall improvement in military justice.

The content of the pretrial advice is dependent upon its purpose, which is twofold. First, it gives the convening authority the benefit of his staff judge advocate's professional knowledge and skill in determining whether the charges allege offenses under the Code and are warranted by the evidence indicated in the report of investigation conducted under the provisions of Article 32(b), UCMJ. Second, it provides the convening authority with advice as to the appropriate disposition of the charges.[51] In the exercise of his judicial discretion and judgment, the convening authority may refer the charges to a general, special or summary court-martial for trial. In addition, he is authorized to dismiss the charges, to impose non-judicial punishment under the provisions of Article 15, UCMJ, or to initiate various administrative actions of a non-punitive nature against the accused. All of these

[51] Although the pretrial advice usually is considered by an appellate body only in ascertaining whether the requirements of Article 34, UCMJ, have been met, the statement of facts in the pretrial advice may be considered by the Court of Military Appeals in determining whether the accused's plea of guilty was improvident under Article 45, UCMJ. See United States v. Lenton, 8 USCMA 690, 25 CMR 194 (1958).

actions, except the last, are judicial in nature and may not be delegated but rather require the personal action of the convening authority.[52]

Considering the purpose of the pretrial advice and that each case involves different circumstances, it is necessary to tailor each pretrial advice to the particular charges under consideration. However, each advice should contain certain matters which will be discussed below. The form of the advice varies among the services and among the commands within a service. A suggested format is included as an Appendix to this article.

As with any legal document, the advice should be identified, dated and directed to the proper authority. The body of the document should be divided into logical components. The main sections of the body of the advice are: (1) statement of responsibility, (2) synopsis, (3) charges and specifications, (4) the evidence pertaining to the offense, (5) personal data concerning the accused, (6) discussion of the sufficiency of the investigation, whether the charges are warranted and the anticipated legal issues and (7) disposition of the charges, including all recommendations.

1. *Statement of Responsibility*

An introductory paragraph should set forth that the charges were referred to the staff judge advocate under Article 34, UCMJ, for consideration and advice. In addition, it should state the convening authority's statutory responsibility, *i.e.*, to determine whether the charges allege offenses under the Code and are warranted by the evidence and to determine the appropriate disposition of the charges. Thus, the convening authority is informed as to the nature of the document and he is reminded of his statutory duties. Also, in the event of trial, the accused is assured that both staff judge advocate and the convening authority carefully considered the pretrial proceedings.

2. *Synopsis of Advice*

Next, a brief synopsis of the entire matter should be set forth. The advice is not a mystery story and does not require suspense to the last page. For this reason, the convening authority should be told in simple language with what and how the accused is charged, whether a proper investigation was made and the recommended disposition. The remainder of the advice should consider these items in detail.

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[52] MCM, 1951, para. 35*a*; see notes 8 and 16, *supra*.

3. *The Charges and Specifications*

The following section details the charges and specifications, considers their sufficiency, and notes the maximum punishment for each offense. The latter is an important factor in determining the appropriate disposition of the charges. However, care must be exercised because some offenses may not be separate for the purpose of punishment. If not separate, the convening authority should be so told for otherwise, he may believe that the charges are more serious than they are. Sometimes the determination of separateness cannot be made until all the evidence is presented in court. In this situation, it is best to advise the convening authority that probably the offenses are not separate for the purposes of punishment.

Because the charges usually are prepared by officers without any legal training, it is often necessary to redraft the charges to correct minor defects. Although such formal corrections may be made before the advice is submitted to the convening authority, if other changes such as a deletion or changes of allegations amounting to a partial dismissal of the charge are recommended, it may be more practicable to defer such formal corrections and to include them in the advice as a part of the recommended action for the convening authority. Article 34(b) of the Code authorizes not only formal corrections but also such changes in the charges and specifications as are needed to make them conform to the evidence. However, the general nature of the charges cannot be changed. If the change adds any person, offense, or matter not fairly included in the charges as preferred, new charges must be signed and sworn to.[53] This probably would require a new investigation under Article 32(b), UCMJ, unless the matter was covered by the previous investigation and no demand for further investigation is made by the accused.[54] The failure to do this may result in prejudicial error. Thus, where the accused was charged with wrongful possession of heroin and the advice was rendered on such charge, but the accused was actually tried for attempted possession of marihuana and the record did not show how this came about, the board of review held that there was a failure to

[53] MCM, 1951, para. 33*d;* see United States v. Brown, 4 USCMA 683, 16 CMR 257 (1954), and United States v. Smith, 8 USCMA 178, 23 CMR 402 (1957). In the latter case, the charge of larceny was changed to robbery. The Court held that the convening authority was acting within his statutory authority. Although the change was substantial and may have resulted in trial upon unsworn charges, this was waived by the failure to object at the trial.

[54] See UCMJ, art. 32(c).

comply with the provisions of Article 34 of the Code and that the failure required reversal.[55]

Naturally, if the identity and the gravamen of the offense is changed by the redraft and timely objection is made, but overruled by the law officer, prejudicial error results.[56] Any redraft should be made on or attached to the original charge sheets to avoid the strange rule that the statute of limitations runs only against the charge sheet referred for trial. A complete redraft of the charge sheet might result in the statute having run against the charge referred to trial.[57] In *United States v. Smith*,[58] the Court, in construing that part of Article 34(b), UCMJ, which permits changes in the charges and specifications as are needed to make them conform to the evidence, indicated that it was appropriate for the advice to contain recommendations for such changes and for the convening authority to order the amendment so as to allege a *greater* offense. Further action should be taken to have the accuser swear to the charge as amended. Accordingly, such recommended changes should be set forth in the advice. In addition, recommended changes to allege lesser offenses, which amount to a partial dismissal, should be set forth. To avoid any question as to exactly what is being recommended or what is actually referred for trial, the amended specification could be set out in the advice. In some cases this can be done in the section detailing the charges and specifications. In other cases, an understanding of the evidentiary situation is necessary. If so, the matter should be deferred until the evidence has been summarized and the legal problems have been discussed.

4. *Summary of Evidence*

The convening authority will want to know the facts in the case and the next part of the advice should summarize the competent evidence contained in the report of investigation. Thus, the convening authority will have a proper basis to determine whether the charges are warranted. As previously indicated, a *prima facie* standard is all that need be applied.[59] Accordingly, the staff judge advocate need not include all possible defenses or inconsistencies which might be indicated by the evidence in the report of investigation. However, such matters may be of sufficient importance to be included for they might have a bearing

[55] CM 390577, Miller, 22 CMR 351 (1956).
[56] CM 386028, Kitts, 20 CMR 467 (1955).
[57] United States v. Rodgers, 8 USCMA 226, 24 CMR 36 (1957).
[58] 8 USCMA 178, 23 CMR 402 (1957).
[59] See notes 18 and 19, *supra*.

upon the recommended disposition. Certainly, the convening authority should consider these matters when he exercises his discretion in disposing of the charges, *i.e.*, whether to refer the charges for trial by general court-martial or to take some other action.[60] Whether to include such matters in this part of the advice or in a later part is a matter of choice. One method is to divide this section into two parts: (1) evidence supporting the charges and (2) other evidence. In any event, the summary should be restricted to sworn or affirmed testimony presented or properly considered at the Article 32(b), UCMJ, investigation and to official records and other evidence properly considered by the investigating officer. The reason for this limitation is that the convening authority must find that the charges are warranted by the evidence indicated in the report of investigation. Under decisions of the United States Court of Military Appeals, the Article 32(b), UCMJ, investigating officer may consider statements of witnesses only if the statements are supported by oath or affirmation.[61] Unless waived, such a defect in the investigation may result in the granting of a motion for appropriate relief, *i.e.*, referral of the charges back to the convening authority to permit the defect to be cured by another investigation.[62]

There are, of course, many ways to present the evidence indicated in the report of investigation. Usually, a chronological development will be clearer than other methods. In some situations, this may be covered adequately by stating ultimate facts. In other situations, the development might be through a concise summary of the witnesses' testimony. In other cases, a development of the case from the discovery of the crime back to the accused through the investigative process by the authorities may make the case more understandable, alive and vivid. Regardless of the method, the facts and evidence should be presented accurately, fairly, impartially and coherently. Inferences may be set forth but, if so, the circumstances from which drawn should also be indicated. This is not to say that each little fact and circumstance must be detailed in the advice; however, sufficient facts should be set forth so that the situation is fairly and accurately represented to the convening authority. By this means, the advice will be of substantial assistance to the convening authority and will also withstand any possible attack. Obviously, a pretrial advice which

[60] United States v. Foti, *supra* note 50.

[61] United States v. Samuels, 10 USCMA 206, 27 CMR 280 (1959).

[62] A motion may be made to the convening authority prior to trial for appropriate relief to reach a defect in the pretrial investigation or the pretrial advice.

misrepresents the facts may be subject to attack either before or at the trial.

As indicated above, the evidence supporting the charges and the other evidence which may negate or be in conflict therewith might be summarized separately. This will emphasize that all of the evidence is not against the accused. It will distinguish the *prima facie* case from the other evidence and assist in the practical problem of determining the appropriate disposition. Occasionally, despite the existence of a *prima facie* case, the other evidence may be of such a quality that it is neither feasible nor justifiable to refer to the charges for trial.

If there are multiple specifications, clarity may be enhanced by summarizing the evidence as to each specification under a separate subdivision. However, this is not inflexible and depends upon the specifications, their relationship, if any, and the nature of the evidence.

5. *Consideration of the Accused as an Individual*

Information about the accused should be included in the pretrial advice. The convening authority is considering not merely a case but the case of a particular soldier or officer. Much information concerning the accused may be obtained from official personnel records and other official sources. Items such as age, marital status, number of dependents and their location, military service, education and classification under standard service tests, security clearances, official character and efficiency ratings, special military schooling, military occupational specialties, duty assignments, foreign service, combat record, decorations and awards and previous disciplinary or administrative proceedings, are all matters which will permit the convening authority to evaluate the accused as an individual soldier. Because these are all contained in the accused's official records, he may anticipate that they are known to the authorities and will be considered. Thus, even convictions and punishments not admissible into evidence as part of the pre-sentencing procedure may logically be considered by the convening authority.[63]

[63] See MCM, 1951, para. 75*b*(2). Generally, only offenses committed during a current enlistment or term of service and during the three years next preceding the commission of any offense of which convicted, are admissible for the court's consideration. However, other convictions may be admissible for other purposes such as impeachment or as affecting the credibility of a witness. Likewise, in acting upon a sentence, the convening authority is not limited to matters presented in court, but rather he is authorized to refer to all information relevant to the sentence which is included in the accused's service record. See United States v. Lanford, 6 USCMA 371, 20 CMR 87 (1955).

Although the Code does not specifically require the convening authority to consider each case upon its own merits in determining whether it should be referred for trial by general court-martial, Congress probably intended individual consideration of each case. Thus, the investigation conducted under Article 32, UCMJ, must include not only an inquiry into the truth of the matters alleged, but also what disposition should be made of the case in the interest of justice and discipline. The Manual also requires that the advice of the staff judge advocate or legal officer include a recommendation as to the action to be taken with respect to the charges.[64] In reviewing and extending possible clemency after trial, the convening authority is required to consider each case on its own merits and must afford the accused a careful and individualized review of the sentence.[65] Common sense dictates that an accused be afforded the same type of personalized consideration of the type of court to which the charges should be referred. In the *Foti* case the Court of Military Appeals remarked "that criminal charges should receive individualized treatment and when . . . there are factors which would have a substantial influence on the decision of the convening authority, they should be furnished to him."[66] The Manual also expresses a policy that "charges, if tried at all, should be tried at a single trial by the lowest court that has power to adjudge an appropriate and adequate punishment." [67] This is generally a matter of judgment and discretion, and an accused has a right to have the convening authority exercise his discretion after carefully and fairly considering the facts and circumstances in the light of all reasonably available information.[68] This includes the consideration of matters in mitigation and extenuation which should be summarized in the pretrial advice.[69]

[64] MCM, 1951, para. 35*b*.
[65] United States v. Wise, 6 USCMA 472, 20 CMR 188 (1955).
[66] United States v. Foti, *supra* note 50, at 304, 30 CMR at 304.
[67] MCM, 1951, paras. 30*f* and 33*h*.
[68] CM 393333, Goins, 23 CMR 542 (1957).
[69] NCM 57–00202, Tolbert, 26 CMR 747 (1958). The phrase "mitigation and extenuation" is not quite accurate. Mitigation is normally used in connection with punishment to be imposed by the court. The purpose of mitigating matters is to lessen the punishment or to be a basis for clemency. Usually such matters relate to some attribute, condition, or situation personal to the accused which may, or may not, have relationship to the offense. Extenuation relates to the circumstances surrounding the commission of the offense. See MCM, 1951, para. 75*c*(3). As used in a pretrial advice, it would include any matter concerning the accused or the circumstances surrounding the offense which should be considered in determining if disposition other than trial by general court-martial would be appropriate. Because these are included in the section of the pretrial advice relating to the evidence and the personal data concerning the accused, separate consideration thereto is not necessary.

Naturally, the advice must not mislead the convening authority by statements in the pretrial advice. Thus, if the pretrial advice states that there are no mitigating circumstances and that the investigating officer recommended trial by general court-martial when in fact, the investigating officer recommended trial by special court-martial and detailed some mitigating circumstances, the convening authority has been misled and the accused has been prejudiced.[70] The duty of the staff judge advocate has been expressed as follows:

> [A] staff judge advocate must fully comply with Article 34 of the Code, * * * The Article requires that he consider and give advice upon every charge before it is referred to a general court-martial for trial. This is an important pretrial protection accorded to an accused, and Congress had in mind something more than adherence to an empty ritual. It placed a duty upon the staff judge advocate to make an independent and informed appraisal of the evidence as a predicate for his recommendation. His is the role of an adviser, and unless he reviews the record thoroughly and accurately he cannot soundly advise the man who had to make the ultimate decision. Therefore, to the extent that his advice is incomplete, ill-considered, or misleading as to any material matter, he has failed to comply with the statutory obligation which rests upon him.[71]

Of course, not every misstatement will result in prejudice. One board of review stated:

> To be sure, misstatements or omissions of material facts from an advice could cause a convening authority to err in his selection of a trial forum, to the prejudice of an accused. . . . But, to label as prejudicial error the omission of the accused's combat record from the advice would, as a practical matter, attach unwarranted prominence to a single factor to the exclusion of others that go to make the determination of what disposition should be made of the charges in the interests of justice and discipline.[72]

In another case in which the advice erroneously characterized the accused's service as unsatisfactory and failed to mention that the investigating officer recommended trial by special court-martial, it was held that the convening authority was misled to the prejudice of the accused and a rehearing was necessary.[73] However, omissions are not always prejudicial. Thus, in one case a board of review held that the failure of the advice to set forth the recommendation of the investigating officer for trial by sepcial court-martial was not prejudicial.[74]

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[70] United States v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1955).

[71] *Id.* at 572, 20 CMR at 288.

[72] ACM 14116, Geib, 24 CMR 840, 843 (1957), *rev'd on other grounds*, United States v. Geib, 9 USCMA 392, 26 CMR 172 (1958).

[73] ACM 13076, Matthews, 23 CMR 790 (1956). See also United States v. Foti, *supra* note 50.

[74] CM 400812, Denniston, 27 CMR 721 (1959). The decision was based on a determination that the convening authority was not misled, that there was

6. *Sufficiency of Investigation, Whether Charges Warranted and Legal Issues*

The advice also should discuss the legal sufficiency of the investigation conducted under the provisions of Article 32, UCMJ.[75] The requirements for this investigation are set forth in that article which, together with the decisions of the service boards of review and the Court of Military Appeals, provide a measuring rod for the adequacy of the investigation. The formal report of the investigating officer, which is made by the completion of a Department of Defense form, normally assures that the minimal procedural and substantive requirements are met. Unfortunately, many investigations suffer from a failure to extend the investigation to cover all facets of the incident in question or all matters

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no indication that the staff judge advocate ignored the recommendation for a special court-martial and that there was a waiver of any defect by the failure of counsel to object. The board also noted that the Court of Military Appeals had rejected a similar claim of error in CM 394874, Keesler, *pet. denied*, 8 USCMA 767 (1957). See also CM 403183, Arsenault, 28 CMR 602 (1959), *pet. denied*, 11 USCMA 781, 29 CMR 586 (1960). The problem resolves itself into a question of whether in the circumstances of a given case the failure might have had a substantial influence upon the decision of the convening authority. In other words, is there a fair risk of prejudice?

[75] UCMJ, art. 32, provides:

"(a) No charge or specification shall be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiries as to the truth of the matter set forth in the charges, form of charges, and the disposition which should be made of the case in the interest of justice and discipline.

"(b) The accused shall be advised of the charges against him and of his right to be represented at such investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

"(c) If an investigation of the subject matter of an offense has been conducted prior to the time the accused is charged with the offense, and if the accused was present at such investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subdivision (b) of this article, no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

"(d) The requirements of this article shall be binding on all persons administering this code, but failure to follow them in any case shall not constitute jurisdictional error."

bearing upon the collection and obtaining of evidence by responsible officials. This problem will remain as long as non-lawyers are appointed as investigating officers. However, it can be minimized by close coordination between the investigating officer and the staff judge advocate.

If the investigation is incomplete, the convening authority may direct further investigation. Normally, further investigation would be accomplished before the pretrial advice is submitted to the convening authority. In any event, the advice should set forth and evaluate all deficiencies in the Article 32(b) investigation. The failure to do so may indicate that the investigation and the advice are mere formalities.[76]

A more troublesome area is the review of the facts which bear upon the elements of the offenses charged. Because the convening authority is required to determine not only whether the charges allege offenses under the Code but also whether they are warranted by the evidence in the report of investigation, he should be advised, in one way or another, as to the elements of the offenses and the evidence which tends to support the allegations. If the evidence supporting the allegations has been summarized previously, only a short resumé is necessary. However, this portion of the advice may include factual and legal issues which may arise, including defenses or partial defenses. Thus, the convening authority will be informed as to all known issues and problems which may arise if the charges are referred for trial.

Any deficiencies in the evidence should be noted. If the evidence does not support the charge or any included offense, a recommendation to dismiss would be required. However, if the evidence supports an included offense, a recommended specification should be included in the advice. The failure to include the recommendation for trial on the included offense and to set it out in the advice may result in a void of such a magnitude that appellate authorities may be unable to determine whether the staff judge advocate made an informed appraisal of the evidence as a predicate for his recommendation. Thus, in one case charges of aggravated assault and communicating a threat were investigated under Article 32(b), UCMJ, and the investigating officer recommended that the latter charge be dismissed and that the accused be tried by inferior court-martial on charges of assault and battery. Contrary to this, the staff judge advocate recommended trial by general court-martial and stated that the charges were warranted by the evidence. However, the accused was tried

[76] United States v. Huff, 11 USCMA 397, 29 CMR 213 (1960).

by a general court-martial only on charges of assault and battery. The board of review was unable to determine how this resulted and whether the staff judge advocate had made an informed appraisal of the evidence. Accordingly, it could not ascertain if the convening authority had been advised fully and accurately as required by Article 34, UCMJ.[77] Thus, any recommendations by the staff judge advocate should be clear, concise and included in the advice. Obviously, extreme care must be exercised to advise the convening authority as to the applicable law. Under some circumstances, to misinform him as to the law would be prejudicial error.[78]

This section of the advice may also cover any psychiatric evaluation of the accused. This is important whenever the authorities have seen fit to obtain such an evaluation and is of utmost importance in a capital case.[79] Likewise, consideration of any pertinent administrative regulations should be detailed, particularly if the regulations authorize administrative measures in lieu of trial.[80]

7. *Recommendations and Dispositions*

Certainly, the advice should state all forwarding recommendations. In some cases a brief statement that trial by a particular type of court has been recommended is sufficient. However, qualifications should be noted. For example, if a commander recommends trial by general court-martial but also recommends that the accused be retained in the service, such matter might be significant. Mature, independent recommendations by commanders who forward the charges are desired. Unfortunately, some subordinate commanders make a recommendation based not on their own conviction but on what he believes the superior commander would like to see. Fortunately, the percentage of this type of "Yes men" is probably small and, for the most part, a commander exercising general court-martial jurisdiction acts only upon being aware of all revelant factors and the considered opinion of the investigating officer and all intermediate commanders. For this reason the boards of review and the Court of Military Appeals have stressed the importance of advising the convening authority as to these forwarding recommendations. In some cases the failure to set forth the recommendations or misadvice as to such recommendations may be prejudicial to the substantial rights of

[77] CM 396449, Richmond, 24 CMR 322 (1957).
[78] ACM 14318, Knowles, 24 CMR 875 (1957), *pet. denied*, 8 USCMA 792, 25 CMR 486 (1958).
[79] CM 394757, Lucas, 24 CMR 410 (1957).
[80] CM 393333, Goins, *supra* note 68.

the accused and require corrective action. This is not to infer that the staff judge advocate's recommendations are not without weight and these must be set forth. In some situations the reasons for the recommendations should be set forth. Such recommendations should be clearly identified as the staff judge advocate's and should be precise and sufficiently detailed so that there is no question as to what is recommended. Thus, it is not enough that a recommendation for trial be made but rather, should include that the charges, or some of them, be corrected, modified, deleted, or re-charged to conform to the evidence and referred for trial by general court-martial or otherwise disposed of. The advice also should contain a proposed direction or order to be signed or initialled by the convening authority.

VII. SUMMARY

Although the pretrial advice has been required for over forty years, the full potential of the advice has not been exploited by staff judge advocates. It can be an excellent device to inform and educate the convening authority as to his judicial functions and responsibilities and those of the court-martial. Only a thorough, impartial and professional analysis of the charges and report of investigation and recommendations thereon, together with individualized consideration of each case will carry out the Congressional mandate. In addition, it will preclude the improper or unwise referral of some charges to a general court-martial. Such analysis should influence the staff judge advocate to insist upon a more thorough investigation of the charges by the Article 32 investigating officer. Likewise, improvement should be reflected in the actual trial and reduction in appellate issues. In short, improvement in the quality of the pretrial advice can result only in a higher quality of military justice and a greater confidence in the system.

VIII. APPENDIX
AUTHOR'S PROPOSED FORM OF PRETRIAL ADVICE

(Heading)

(File No.) (Date)

ADVICE OF THE STAFF JUDGE ADVOCATE

TO: (OFFICIAL DESIGNATION OF CONVENING AUTHORITY)

1. REQUIREMENTS PRIOR TO TRIAL BY GENERAL COURT-MARTIAL

This advice on the attached charges and report complies with Article 34, UCMJ, which requires that, before directing trial of any charge by general court-martial, you refer it to your staff judge advocate for consideration and

advice. The purpose is to assist you in discharging your non-delegable judicial responsibilities. Also, you must find that the charge:

a. Alleges an offense under the Code and

b. Is warranted by the evidence indicated in the report of the Article 32, UCMJ, investigation.

A charge is so warranted if there is probable cause to believe that the accused committed the offense charged. This is less than proof beyond a reasonable doubt which is applied by a court-martial. The determination of whether the charge is warranted necessitates a review of the investigating officer's report because Article 32 requires a thorough and impartial investigation of all matters set forth in the charge, including inquiries as to the truth of the matters, form of charges, and the disposition which should be made of the case in the interest of justice and discipline.

If an offense is alleged and warranted, you must personally determine the disposition. You have discretion to dismiss the charge, take administrative action, impose non-judicial punishment under Article 15, UCMJ, as to minor offenses, or to refer the charge to a summary, special or general court-martial. In exercising your judgment and discretion, you must consider each case individually upon its own merits. This advice includes information regarding those factors which you should consider in deciding the disposition of the charges. Although I have been assisted by the Chief of Military Justice in the preparation of this advice, it is my personal, independent and professional review of the matters together with my recommendations.

2. SYNOPSIS

This soldier is charged with burglary and larceny. The evidence indicates that he unlawfully entered a barracks with intent to commit larceny and that he stole about $180.00 and a social security card. Each charge alleges an offense under the Code. The charge of larceny is warranted. The charge of burglary is not warranted; however, the lesser offense of housebreaking is. The Article 32 investigation was legally sufficient. I recommend that charges of housebreaking and larceny be referred for trial by general court-martial.

3. CHARGES (Summarized)

Private (E–2) John J. Doe, RA 12 345 678, Company D, 1st Battalion, 1st Regiment, is charged as follows:

Charge I: Article 129, UCMJ, Burglary.

Specification: Did, at Fort Blank, New York, on or about 30 September 1962, in the nighttime, burglariously break and enter room 2, building 101, Fort Blank, New York, the property of the United States, the dwelling house of Privates William Able, Charles Baker, and John Delta, with intent to commit larceny therein.

Charge II: Article 121, UCMJ, Larceny.

Specification: Did, at Fort Blank, New York, on or about 30 September 1962, steal about $50.00, the property of Private William Able; about $60.00, the property of Private Charles Baker; and about $70.00 and a Social Security Card, of some value, the property of Private John Delta.

Punishment: The maximum punishment for burglary is a dishonorable discharge, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade and confinement at hard labor for 10 years. The punishment for this larceny is the same as for burglary except that the confinement is

limited to 5 years. However, the charge of burglary is not warranted but the lesser included offense of housebreaking (Art. 130, UCMJ) is. The maximum punishment for housebreaking is the same as larceny. Thus, the total authorized punishment, if convicted by general court-martial of housebreaking and of larceny, is a dishonorable discharge, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade and confinement at hard labor for 10 years. For the purpose of punishment, the offenses of housebreaking and larceny are separate (*US* v. *Gibson*, 3 USCMA 746, 14 CMR 164 (1954)). However, the court-martial will consider the nature of the offenses, the surrounding circumstances, the age of the accused, his background, any matters in mitigation or extenuation, together with instructions by the law officer in determining a legal, adequate and appropriate punishment. Based upon the information available, the offenses are sufficiently serious to warrant trial by a general court-martial rather than a special court-martial.

Sufficiency of charges to allege offenses: Although each specification alleges an offense, a redraft of the burglary specification to allege housebreaking should be made. Also, the larceny specification should be redrafted to correct minor irregularities. Both are authorized by Article 34*b*, UCMJ, and paragraph 33*d*, MCM, 1951. A specific recommendation as to this and other matters is contained in paragraph 6g.

4. EVIDENCE

The following is based upon sworn testimony given at the Article 32*b*, UCMJ, investigation or upon sworn statements properly considered by the investigating officer.

a. *Evidence supporting the charges.* Privates Able, Baker and Delta, members of Company C, were paid on 30 September 1962. On that night they went to the movie together and then returned to their assigned quarters, room 2, in building 101. Prior to retiring, each placed his trousers containing his wallet in his wall-locker. Private Able had about $50.00 in his wallet; Baker, about $60.00; and Delta, about $70.00. The door to the room was left open. Shortly before reveille on 1 October Private Jones, a guard, saw the accused leave building 101. Jones has known the accused for several months and both are quartered in building 109. In the morning, Able checked his wallet and discovered that his money was missing. Baker and Delta were present and they checked their wallets. Each discovered that his money was gone. None had given anyone permission to take his money. Delta also discovered that his Social Security Card was missing. The soldiers immediately reported the loss to their commander, Captain Smith. By mid-afternoon, Captain Smith discovered that the accused, although only paid $10.00 on 30 September had repaid several loans amounting to about $100.00. This, coupled with the identification of the accused by the guard, resulted in the accused's apprehension. A search of the accused's person revealed $30.00 in cash and Delta's Social Security Card.

The accused was subsequently questioned by a Military Policeman. The accused admitted that he entered building 101 to find some money and that he took about $180.00.

b. *Other evidence.* On the night in question, the accused was at the Bar-X bar located about two miles from this post. In the opinion of several soldiers who observed and conversed with him, the accused was quite drunk. One of the soldiers gave the accused a ride back to Fort Blank. It was light when they arrived. Because the accused had fallen asleep, it was necessary to

awaken him. The accused told him he was billeted in building 109. Although he could walk, it was a "staggering walk."

5. PERSONAL DATA

The accused is a 23-year-old, single, Caucasian soldier. He was born on 17 January 1939 at Chicago, Illinois. He has two brothers. His father is deceased. He left high school at the end of three years in order to work. He was employed at various clerking and mechanical jobs until he enlisted on 20 June 1960. He has an ACB Score of 3 and a GT Score of 97. In the Army he has been a truck driver and supply clerk. There is no evidence of any convictions in civil life. There is evidence of one previous conviction by summary court for AWOL and being drunk and disorderly in public on 15 July 1961. The accused has been restricted since 30 September. His last official character and efficiency ratings were excellent (17 December 1960). His character is presently rated "unsatisfactory" and his efficiency as "excellent" by his unit commander who believes the accused should be eliminated from the Army by means of a punitive discharge.

6. DISCUSSION

a. *General.* The pretrial investigation was conducted in compliance with Article 32b, UCMJ. The accused was represented by a qualified judge advocate officer. Witnesses were examined and cross-examined under oath in the presence of the accused and his counsel. Witnesses were called by the accused and he was permitted to present matters in mitigation. There is no evidence that the accused was not mentally responsible at the time of the alleged offenses and that he is not mentally capable to stand trial.

b. *Sufficiency of evidence as to burglary and larceny.* Burglary is the breaking and entering in the nighttime of the dwelling house of another with the intent to commit certain offenses, including larceny (Art. 129, UCMJ). The evidence in the report indicates that any entry by the accused was made in the daytime rather than the nighttime. There was no force to constitute a breaking. Thus, the charge of burglary is not warranted. However, housebreaking (Art. 130, UCMJ), which is the unlawful entry into a building of another with intent to commit a criminal offense is a lesser included offense with burglary. In general, an entry is unlawful if willfully done without any authorization. An entry by a soldier from another unit into a building in the dead of night has been held to be without any authority (*US* v. *Williams*, 15 CMR 241 (1954)). In my opinion no authority exists here where the entry, although not in the nighttime, was while the occupants were still asleep some 30 minutes before reveille.

An intent to commit larceny is necessary. The evidence establishes larceny in the building. This, together with the circumstances surrounding the entry, establishes the accused's probable intent to commit larceny at the time of the unlawful entry. There is substantial evidence of each element of the offenses so as to permit consideration of the accused's confession which encompasses both offenses (*US* v. *Isenberg*, 2 USCMA 349, 8 CMR 149 (1953); *US* v. *Vallasenor*, 6 USCMA 3, 19 CMR 129 (1955)).

c. *Admissibility of confession.* The accused was advised as required by Article 31, UCMJ, and he voluntarily made a statement admitting, in substance, the housebreaking and larceny. Although the accused claims that he asked to see a lawyer at the outset of the interrogation, the investigator denies this. If such a request was made and denied, his statement will not

be admissible (*US* v. *Gunnels*, 8 USCMA 130, 23 CMR 354 (1957) and *US* v. *Rose*, 8 USCMA 441, 24 CMR 251 (1957)). This is necessarily an issue of fact.

d. *Legality of search and seizure of money and social security card.* After the reports of loss were made, Captain Smith made an inquiry which disclosed that the accused, who is billeted in building 109, had been paid only $10.00, that he had repaid loans in the amount of about $100.00 and that he was seen leaving building 101 shortly after daybreak. In my opinion Captain Smith lawfully apprehended the accused because he had sufficient facts from which he could reasonably believe that burglary-or housebreaking-and larceny had been committed by the accused. A search of the accused was authorized as incident to his apprehension (*US* v. *Florence*, 1 USCMA 620, 5 CMR 48 (1952)). Although the bills found on the accused could not be identified, the possession of Delta's Social Security Card permits certain inferences to be drawn. Thus, the exclusive and unexplained possession of recently stolen property permits an inference that the possessor is the thief and possession of a part of such stolen property permits an inference that such person stole all of the property (*US* v. *Johnson*, 3 USCMA 447, 13 CMR 3 (1953) and *US* v. *Hairston*, 9 USCMA 554, 26 CMR 334 (1958)). Thus, even apart from the confession, there is evidence which connects the accused with the housebreaking and larceny.

e. *Evidence relating to intoxication.* Severe intoxication may render an accused mentally incapable of forming a specific intent (*US* v. *Backley*, 9 CMR 126 (1953)). Here, the unlawful entry must have been with the specific intent to commit larceny which also requires a specific intent permanently to deprive the owner of his property. Thus, intoxication may raise a factual issue as to the accused's intent. However, the detailed nature of the accused's statement and the circumstances under which the acts were performed, indicate that the accused probably could, and did, form the required intents.

f. *Unavailability of Witnesses.* Private Able has been discharged and is in California. It is not feasible to subpoena him as a witness. Thus, his name should be ommitted from the larceny specification.

g. *Redraft of charges.* As previously indicated, the charges should be redrafted. The following is the recommended form:

Charge I: Violation of the Uniform Code of Military Justice, Article 130.

Specification: In that Private (E–2) John J. Doe, U.S. Army, Company A, 1st Regiment, did, at Fort Blank, New Work, on or about 1 October 1962, unlawfully enter building 101, Fort Blank, New York, the property of the United States, with intent to commit larceny therein.

Specification: In that Private (E–2) John J. Doe, U.S. Army, Company A, 1st Regiment, did, at Fort Blank, New York, on or about 1 October 1962, steal about sixty dollars ($60.00), lawful money of the United States, the property of Private Charles Baker and about seventy dollars ($70.00), lawful money of the United States, and a Social Security Card, both the property of Private John Delta.

7. DISPOSITION OF CHARGES

a. *General.* In view of the nature and circumstances of the offenses which, in my opinion, are warranted by the evidence indicated in the report of investigation, trial by general court-martial is appropriate in the interests of justice and discipline.

b. *Forwarding recommendations:*

(1) The unit commander recommends trial, as charged, by general court-martial and states that he believes that the accused should be separated from the service by a punitive discharge;

(2) The Investigating Officer and the Battalion Commander recommend trial, as charged, by general court-martial.

c. *I recommend:*

(1) That the chages be redrafted, amended and corrected as indicated in paragraph 6 to allege the offenses of housebreaking and larceny; and

(2) That as redrafted, amended and corrected, the charges be referred for trial by the general court-martial appointed by GMO #6, this headquarters, dated 7 September 1962.

s/John E. Advocate
t/JOHN E. ADVOCATE
Colonel, JAGC
Staff Judge Advocate

ACTION OF OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION

(Date)

Pursuant to Article 34, UCMJ, and paragraph 35a, MCM, 1951, the following action on the charges against Private (E–2) John J. Doe, RA 12 345 678, dated 4 October 1962, is ordered:

The charges will be redrafted, amended and corrected as recommended and referred for trial by the general court-martial appointed by Court-Martial Appointing Order Number 6, this headquarters, dated 7 September 1962.

Other:

s/
t/
Major General, U.S. Army
Commanding

SOVIET SOCIALISM AND THE CONFLICT OF LAWS*

BY JOHN N. HAZARD**

I. INTRODUCTION

The conflict of laws and the philosophy of law are closely intertwined in the thinking of Soviet jurists. At this time, when the U.S.S.R. has adopted a new code of fundamental principles for civil law, in which there appears a set of rules for international private law, it is appropriate to consider the extent to which Soviet concepts in the legal field are influenced by their political faith.

Discussion of the interplay between philosophy and the practical requirements of international intercourse is timely, for conditions have changed radically in Eastern Europe and in much of Asia in the last decade, and this change has required a new approach to the conflict of laws in Soviet minds. The economic and political structure of the countries in these areas has been recast in a mold made in Moscow and adapted to the ancient cultures as has seemed necessary. The result is that the U.S.S.R. no longer stands politically alone. From a position of isolation in what Stalin persisted in calling a hostile "capitalist encirclement," the peoples of the Soviet Union have passed to a position said by Nikita Khrushchev to be one of increasing safety, for they are now surrounded by friends.[1] This is the new element that seems, in Soviet minds, to require reconsideration of Soviet attitudes toward conflict of laws. What was earlier regarded by Soviet jurists primarily as a threatening bourgeois instrument of hostile penetration of Soviet society and a means of resisting the impact of her policies abroad is becoming a friendly link between the broadening circle of countries of the socialist camp.

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] Krushchev, Report to the Central Committee of the CPSU, ch. 1, § 6, in Pravda, Feb. 15, 1956.

II. A NEW APPROACH TO PRIVATE INTERNATIONAL LAW

The task of creating a new approach to private international law to reflect relations of friendship is not entirely new. Since the formation of the Soviet federation of republics at the very end of 1922, problems of conflict of laws have emerged in Soviet courts, for each republic had its own codes of law. Though patterned on the same principles, these codes introduced variations thought necessary to accommodate the peculiarities of life in the various regions of the country, and conflicts were inevitable. Still, the variations were kept to a minimum, and the bonds of federation muted the conflict.

Today the differences in economic and cultural features existing between the individual states of Eastern Europe and Asia are wider than those existing between the constituent republics of the U.S.S.R., although all accept the same political leadership in the form of the Communist Party. The Hungarian revolution and Polish resistance of 1956, followed by China's reluctance to accept domination of her policies by communists of the U.S.S.R. provide evidence that communist theory and Soviet power are not sufficiently forceful to compel uniformity in policies and law. In consequence of the emergence of the Peoples' Democracies the geographical area in which the new international private law is operative and the variations in policy that it is required to reconcile are not as restricted as used to be the case when international private law primarily concerned relations between the U.S.S.R. and bourgeois states. International private law has to be reconsidered, for the change in Soviet eyes is more than quantitative. It has a qualitative feature as well.

Soviet discussion of private international law has not lost all reference to the wily bourgeoisie, in spite of the qualitative change in problems that current Soviet authors profess to see, for the hostile world is still large. Readers of the 1959 Soviet treatise on the subject of conflict of laws will find that the authors are still thinking of potential danger from the Western democracies. They warn that the task of international private law in the U.S.S.R. is not only the creation of business links between the socialist and foreign states, but that its task is also the "protection of the U.S.S.R. from juridical 'intervention' of capitalist countries." [2]

[2] Pereterskii and Krylov, Mejdunarodnoe Tchastnoe Pravo [International Private Law] 13 (1959).

The 1959 authors will not let drop the oft-repeated charge that at the Genoa Conference of 1922 the leaders of the capitalist powers tried to establish extraterritorial privileges for their citizens in the U.S.S.R. This charge is further embellished in a second volume devoted to the law relating to foreigners and constituting a foreigners' handbook. It says, "Capitalist countries demanded the introduction for foreign citizens in the Soviet republics of a regime like that of capitulations established by them in some countries of the East." [3]

Old wounds are evidently prodded by current Soviet juristic authors, but eyes are turned to new horizons at the same time. The foreigners' handbook tells its readers, "Since the second world war socialism has burst out of the frame of a single country and has been transformed into a world system. The states of Asia and Africa are throwing off in increasing numbers the yoke of colonial rulership. In these historic conditions the type of foreigners coming to the U.S.S.R. has been changed, for the aims and reasons for their presence in our country have changed." [4] Here is the expression of change in quality of relationships, as seen through Soviet eyes.

A. *RELIANCE ON TREATIES*

In this new era attention is being focused on regulation of the law applicable to relations with foreigners by treaty rather than by development of general principles of private international law. Agreement that seemed impossible of achievement to Soviet statesmen when there existed what they chose to interpret as encirclement by capitalist enemies has become since 1957 a major endeavor of the Soviet Ministry of Foreign Affairs.

A torrent of treaties of judicial assistance has emerged from negotiation with other states of Soviet type economies and legal systems.[5] Cast in almost identical terms, these treaties provide for recognition of foreign marriage and divorce, of obligations arising out of foreign contracts and tortious acts, as well as for enforcement of sentences passed by criminal courts in the Peoples' Democracies. No longer are foreign court decrees resisted in the

[3] Boguslavskii and Rubanov, Pravovoe Polojenie Inostrantsev v SSSR [The Legal Status of Foreigners in the USSR] 7 (1959).

[4] *Id.* at 9.

[5] Iuridicheskaya Komissiya pri Sovete Ministrov SSSR [The Legal Commission Under the Council of Ministers of the USSR], Dogovory ob okazanii pravovoi pomochi po grajdanskim, semeinym i ugolovnyn delam zakliutchennye Sovetskim Soiuzom v 1957–1958gg [Treaties on Judicial Assistance, in Civil, Family and Criminal Matters, As Concluded by the USSR] (1959).

U.S.S.R. as hostile to members of the working classes. The public order system established in the Peoples' Democracies has become subject to protection in the U.S.S.R. as well when those who violate it come within the jurisdiction of Soviet courts. The new criminal codes of the Soviet republics make this clear.[6] The enemy of one becomes the enemy of all, and the friends of one are the friends of all.

B. *THE "ORDRE PUBLIQUE" DOCTRINE*

In no place within the field of international private law has the qualitative change in circumstances become more pronounced than in the new attitude toward "ordre publique." In the second[7] treatise on international private law to be published in the Soviet Union, the Soviet view was stated in terms markedly different from those used by jurists in the western world. To Professor I. S. Pereterskii, writing in 1924, "ordre publique" was "that composite of norms unconditionally applied on the territory of a given state both to its own citizens and to foreigners, for the purpose of preserving the existing class structure of that state."[8] He thought that this category of norms had probably more importance for the U.S.S.R. than for bourgeois states during the transitional period between capitalism and communism in view of the special character of Soviet legislation and the special type of mutual relations with other states. He felt that, while for the bourgeoisie "ordre publique" served to excuse refusal to apply a bourgeois rule, otherwise applicable under private international law, in the abnormal or shocking situation only, for the Soviet jurist the concept had nothing "of the shocking about it."[9] He expected it to be utilized far more frequently in implementation of the principles set forth in the Russian Republic's constitution then in force, namely the constitution of 1918. These principles were notably the declaration that the constitution's major tasks were three-fold: (1) establishing the dictatorship of the urban and village proletariat and of the poorest peasantry for the purpose of the complete suppression of the bourgeoise; (2) abolish-

[6] Ugolovnyi Kodeks R.S.F.S.R. [Criminal Code R.S.F.S.R.], art. 73 (effective Jan. 1, 1961), in Sovetskaya Iustitsiya [Soviet Justice], No. 17, p. 5 (1960).

[7] The first treatise showed no Soviet orientation, but was merely a restatement and consideration of traditional viewpoints. See Makarov, Osnovnye Natchala Mejdunarodnogo Tchastnogo Prava [Fundamentals of International Private Law] (1924).

[8] Pereterskii, Otcherki Mejdunarodnogo Tchastnogo Prava [Essays on International Private Law] 31 (1924).

[9] *Id.* at 29.

ing the exploitation of man by man; and (3) ushering in socialism. The principles to be preserved included also the separation of curch and state and the equality of races and ethnic groups. The foreign laws specifically to be rejected in Pereterskii's view were those relating to private ownership of land and industry, work contracts, inequality of spouses and races, and those requiring religious affiliation for civil capacity to act.[10]

While the theme of rejection of some aspects of bourgeois law for reasons of "ordre publique" remains in current literature, it is somewhat muted. In the 1959 handbook for foreigners, the authors state that the law prohibiting inter-racial marriage as it exists in a few states of the United States of America will not be applied to prevent the intermarriage within the U.S.S.R. of whites and negroes from the United States. Nor will the insulting of negroes by American citizens in the U.S.S.R. be permitted to occur, as it is said to have occurred in the 1930's following a dispute between white and negro American engineers over the negro's appearance in the engineers' dining hall. Further, the 1959 authors expressly reject application of or even aid to application abroad of laws of states limiting the rights of married women. They give, as an example of the correct Soviet position, rejection of a request made by a Belgian subject to a Soviet state notary to issue a certificate to the effect that the Belgian husband then in the U.S.S.R. had no objection to a gift proposed by his wife to her brother of a small house she had received by inheritance.[11] In the Soviet authors' view issuance of such a certificate would countenance application of a discriminatory Belgian law, even though in the given instance the husband was responding to his wife's desire.

The authors of the 1959 treatise, one of whom had been the author of the 1924 volume to which reference has made, repeats in a few words his earlier conviction that in order to determine the principles of "ordre publique" that must not be violated by application of foreign law, one should read the constitution. Although the form of the constitution of 1918 has been considerably altered in subsequent editions of the basic law, the 1936 constitution presently in force contains essentally the same fundamental principles as did its predecessors. First and foremost in the Soviet jurists' view stand the principle of equality between races and sexes. Consequently, any foreign law preventing a woman

[10] *Id.* at 32.

[11] Boguslavskii and Rubanov, *op. cit. supra* note 3, at 33.

from acting without regard to her husband's wishes will not be applied within the U.S.S.R.[12]

This principle, as it relates to commercial matters, has been enshrined in treaties negotiated by the U.S.S.R. with several European states since the war. Thus, in the commercial treaty with Austria, of October 17, 1955, article 11(c) permits refusal to enforce an arbitral award if it "violates the ordre publique of the state in which the award is sought to be enforced." [13] Similar language is used in the Soviet commercial treaties with Finland of December 1, 1947,[14] with Switzerland of March 7, 1948,[15] with Italy of December 11, 1948,[16] and with Japan of December 6, 1957.[17] To the authors of the 1959 treatise these provisions are meant to exclude application of any norm which is not in accord with the fundamental principles of the political and economic structure of the U.S.S.R.[18]

What has been said with regard to "ordre publique" has no application to relations with states classified as "People's Democracies." Since they all have constitutions incorporating the same general principles of economic and political structure as the U.S.S.R., a conflict of norms relating to a fundamental issue, such as the equality of races or spouses or to an employment relationship, is not envisioned by Soviet authors. It become unnecessary, therefore, to provide for a possible conflict of interest on basic issues, and in the commercial treaties with the Peoples' Democracies, no provision whatever is included for refusal to enforce arbitral awards because of issues of "ordre publique." Thus, the commercial treaty between the U.S.S.R. and the Mongolian Peoples' Republic of December 17, 1957[19] in its article 13 "guarantees execution of arbitral awards in disputes arising out of commercial or other agreements," provided that the dispute was heard by a tribunal on the competence of which the parties had agreed. No other grounds for refusal to enforce the award are stated.

Examination of the treaties concluded in 1957 and 1958 by the U.S.S.R. and the various Peoples' Democracies to provide for

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[12] Pereterskii and Krylov, *op. cit. supra* note 2, at 56.

[13] 18 Sbornik deistv. dogovorov SSSR [Collection of Treaties of the USSR in Force] 280 (1960).

[14] 13 *id.* at 344 (1956).

[15] *Id.* at 363.

[16] *Id.* at 333.

[17] Vedomosti Verkh. Soveta SSSR [Journal of the Supreme Soviet of the USSR], No. 10 (905), Item No. 216 (1958).

[18] Pereterskii and Krylov, *op. cit. supra* note 2, at 56.

[19] Vedomosti Verkh. Soveta SSSR [Journal of the Supreme Soviet of the USSR], No. 9 (904), Item No. 206 (1958).

judicial assistance in civil, family and criminal cases, discloses a similar attitude of confidence in the public order concepts of the parties to the treaties. Refusal to enforce a foreign judgment is countenanced only if the obligor had not been present in court because he had not been properly summoned, or if the judgment is in conflict with a preceding judgment in the same case for the abrogation of which there is insufficient reason in changed circumstances.[20] The treaty is silent with regard to rejection of a judgment because of application of principles of "ordre publique," and it seems reasonable to assume that conflicts of public order seem impossible to jurists within the states of Eastern Europe and Asia applying the Soviet system of government.

C. *APPLICATION OF THE CONFLICTS RULES*

Fear that application of the principles of international private law might cause injury to Soviet society crept into the formalized rules of conflict of laws appearing in the earliest Soviet codes. Thus, the code of civil procedure of the Russian Republic, adopted in 1923,[21] but still in force, provides in Article 7 that "The court in examining contracts and legal documents executed abroad shall take into consideration the laws in force at the place of execution of the contract or legal document if the contracts or legal documents are permitted by the laws and treaties of the R.S.F.S.R. with the state within whose boundaries they were executed." The same precautions were taken in the general principles for a civil code published for discussion in 1960,[22] for by article 105 of these general principles it was provided, "The application of foreign law in no case may occur if such application would conflict with the fundamentals of the Soviet social structure."

The newly adopted general principles of civil law threaten the application of principles of international private law as an instrument of Soviet policy to gain for Soviet citizens equal rights with citizens in countries in which they may happen to have claims. Article 122 of the new general principles reads: "With regard to citizens of those states in which Soviet citizens do not enjoy full civil legal competency, corresponding limitations may be established by the Council of Ministers of the U.S.S.R."

[20] See Treaty of Commerce with Czechoslovakia, Aug. 31, 1957, art. 51, in Treaties on Judicial Assistance, *op. cit. supra* note 5, at 7.

[21] Sob. Uzak. R.S.F.S.R. [Collection of Laws, R.S.F.S.R.], No. 46–47, Item No. 478 (1923).

[22] Sovetskaya Iustitsiya [Soviet Justice], No. 7 Supp. (1960). These principles were adopted on Dec. 8, 1961. Vedomosti Verkh. Soveta SSSR [Journal of the Supreme Soviet of the USSR], No. 50 (1085), Item No. 525 (1961). Article 105 of the draft became Article 128 in the final text.

No similar provisions appear with regard to conflict of laws between Soviet republics. When the Supreme Court of the U.S.S.R. issued its first order on the subject on February 10, 1931,[23] it noted that "there are occasional conflicts in the norms regulating property relations in the legislation of the Union Republics," and it listed the major ones as: a conflict in the maximum period of time for which a contract to build a private home might be executed; the term during which a private house shall be built; the objects that might be pledged to secure a debt or that might be the subject of sale; the payment of commercial agents; the amount of money which the holder of a bill of exchange may demand of the maker after protest of the bill of exchange; and the period of limitation on the bringing of various property actions. To eliminate disparity, the court established a set of rules, none of which provided for discrimination on grounds of policy. Presumably, the only issue was one of convenience.

A similar attitude is carried into the new general principles of civil law in Article 18, devoted solely to conflicts of law between the various republics of the U.S.S.R. The functional character of these norms is evident from the principles they establish. Thus, the following rules are established for application in the event of conflict: (a) the law of the situs of property shall be applied to relationships arising out of the property right; (b) in concluding agreements, legal capacity and physical capacity to act shall be defined by the law of the place of contracting; (c) the form of an agreement shall be determined by the law of the place of contracting, the same rule to be applied to obligations arising out of agreements unless the parties provide otherwise; (d) in the event of an obligation arising out of an injury, the law of the forum shall be applied unless the injured party requests application of the law of the place of injury; (e) in matters of inheritance the law of the place where the inheritance opens [the domicile of the decedent] is applied; and (f) in questions involving prescription or adverse possession the law of the union republic by whose legislation the given relationship is regulated will be applied.

These rules for conflicts between the law of the various republics of the U.S.S.R. omit some of the provisions utilized in succeeding articles in the general principles relating to conflicts with norms of foreign states. Thus, by Article 125, a contract concluded abroad will be enforced within the U.S.S.R. if it conforms to the form required by the law of the U.S.S.R. even though it

[23] Sbor. Deistv. Post. Plenuma i Direkt. Pisem Verkh. Suda S.S.S.R. [Collection of Orders of the Plenum and Directives of the Supreme Court of the USSR, Presently in Force], 1924–1944, pod. red. I. T. Golyakova 182 (1948).

fails to conform to the formal requirements of the law of the place of contracting. By Article 126 the rights and duties of parties under foreign trade contracts and in foreign insurance and transportation contracts are to be defined by the law of the place of contracting, unless the parties provide otherwise, but determination of the place where the contract was been concluded is the province of Soviet law. By Article 127 inheritance is governed by the law of the last permanent place of residence of the decedent, but as to structures on Soviet territory, the law of the U.S.S.R. is alone applicable. The form of a testament, and the legal and physical capacity of a testator are to be determined by the same law as that applying to the inheritance generally, but if the testament conforms to the requirements of Soviet law, it may not be declared invalid because of violation of the law otherwise applicable.

III. FUTURE DIRECTION OF SOVIET INTERNATIONAL PRIVATE LAW

Soviet jurists are themselves at odds over the future direction to be taken by international private law. I. S. Pereterskii has taken the position that the scope of this branch of law should be expanded to include all civil law matters arising in foreign trade, including international payment matters, the gold clause and other matters having a foreign element. He concludes, "The task of all legislation is the regulation of those legal relationships (with a foreign element) by means of a direct provision decisive of the question in substance, or by indicating the applicable law (*i.e.*, by means of the norms relating to conflict)." [24] In criticising this position, his colleagues have said that he is tending to eliminate the boundaries between international private law and civil law applicable within the state, and that this is undesirable because it would cause creation of an entirely new substantive field of law.[25]

Pereterskii's proposals have been popular within the Peoples' Democracies because it seems easy, by means of treaty, to unify the norms of all economic relationships between these countries and thus to create a new international civil law. This is all the more reasonable because there have been created by the treaties

[24] Pereterskii, *Sistema mejdunarodnogo tchastnogo prava* [The System of International Private Law], Sov. Gos. i Pravo, Nos. 8–9, pp. 27–28 (1946).

[25] Levitin, K voprosu o predmete mejdunarodnogo tchastnogo prava [On the Question of the Subject of International Private Law], Izvestiya vyschikh utchebnykh zavedenii, Pravovedenie [News of Supreme Educational Institutions, Jurisprudence], No. 3, p. 98 (1959).

of commerce between the Peoples' Democracies arbitration tribunals resolving all conflicts between public corporations engaged in trade between these countries. For these tribunals it would be a short step to move from a consideration of norms of private international law governing the choice of law applicable to a contract to evolution of a body of law to be applicable uniformly in all cases of conflict and eventually to be codified in a civil code for international trade within the circle of the Peoples' Democracies.

Considering the political and practical attraction of such an argument, it is remarkable that it is being opposed by one Soviet author, as being harmful. His argument in opposition is worth giving in full. He writes:

> Can there be found any serious basis for including within international private law the directly applicable norms of substantive law, and consequently, for their repeated analysis in substance apart from civil law in a veritable science of international private law? Can the parallelism, unjustified as a general rule, which would arise from examination of the very same questions lead in a given situation to any advantage? It seems to us that such parallelism can cause nothing but harm in this case.
>
> Reexamination in international private law of all questions of substance, already decided by civil law, would lead to unnecessary repetition of positions already well known, or to independent, but somewhat superficial, and in any case not very deep investigation, perhaps enough to determine the corresponding questions of civil law in their conflict segment; but not presenting serious scientific interest for civil law.[26]

The author admits that the many treaties on commercial matters and judicial assistance concluded between the Peoples' Democracies have performed a service in making the rule of law more precise than is possible in application of norms of conflict of laws, but he adds, "From this it does not follow that in putting aside the necessity of applying conflict norms to specific relationships, the norms to be applied directly have taken the place of conflict forms in international private law as well." In short, he wants to preserve a set of rules governing the choice of law in the event of a conflict because he believes that even as between the Peoples' Democracies there will persist disputed questions after unification of much of the law because of the uneven economic development of each country and the differing ethnic features and customs, as well as the originality of institutions and concepts of law requiring resolution even when the law is largely unified. There will, in his view, long remain the necessity of applying norms of conflict of laws in relationships close to life: those of family and marriage, of inheritance, of the general prin-

[26] *Id.* at 99–100.

ciples of civil law and of obligations. These cannot, he surmises, be unified in the foreseeable future.

No Soviet jurist has written of the distant future of private international law when communism shall have been achieved in all of the Peoples' Democracies, that is when the state shall have withered away. No doubt the period seems too remote to require consideration, but the logic of the concept of withering away of the state carries with it the withering away of law, including private international law. Stalin suggested in 1930 that when communism had been achieved, there would have emerged a common culture throughout the communist world, including a common language.[27]

If such unification of cultures occurs, the details of cultural differences that may happen to remain must logically be insignificant as a source of dispute, at least of dispute so sharp as to require regulations by the application of law. Conflict will be regulated by morals, and the masses themselves will resolve the conflict without the intervention of legal institutions. Development of the comradely courts and social assemblies within the U.S.S.R. in avowed preparation for the time when the state shall have withered away suggests that disputes arising out of such cultural differences as may remain in the distant future will come before one's neighbors for discussion, and public opinion alone will be relied upon to assure acceptance of what the neighbors decide.[28] A norm of conflict of morals will have replaced the norm of conflict of laws.

[27] Stalin, Report to the 16th Communist Party Congress, 1930, in 12 Stalin, Sotchineniya 368–69 (1949).

[28] For an elaboration of the Soviet view on the role of public opinion, see Hazard, *Le Droit Sovietique et le deperissement de l'Etat*, in 8 Travaux et Conferences, Faculte de Droit, Universite Libre de Bruxelles (1960).

THE MILITARY AGREEMENT IN UNITED STATES LAW AND PRACTICE*

BY RICHARD S. SCHUBERT**

I. INTRODUCTION

In recent times a distinct type of agreement has attained a prominent place in the much debated field of international compacts between the United States and foreign countries. These types of agreements can suitably be referred to as "military agreements" or "military arrangements." They probably exceed in numbers any other sort of intergovernmental accords concluded by the United States with foreigns nations. Although the military agreement shares some of its principal features with other international or intergovernmental agreements, it retains its own characteristics. However, because of its rather inconspicuous nature it has not yet generated the general interest of the legal community which it deserves. One of the most controversial agreements of this type, the Status of Forces Agreement, has aroused public interest from time to time. Otherwise, the military agreement has remained principally within the cognizance of the military legal practitioners, *i.e.*, judge advocate officers and civilian attorney-advisers in the Department of Defense, Army, Navy and Air Force. Upon occasion, State Department lawyers participate in those military agreements which are of a high level type. Possibly for these reasons no serious effort seems to have been made to examine the nature of the military agreement as a legal instrument *sui generis* so at to put it in its proper place in the law of treaties and international agreements. Consequently, the military agreement lacks a suitable classification of its own.[1]

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] The *Draft Convention on the Law of Treaties* (Harvard Law School Research in International Law), in 29 Am. J. Int'l L. (Supp. 1935) fails to refer to this significant area of intergovernmental agreements. Borchard, *Shall the Executive Agreement Replace the Treaty*, 53 Yale L. J. 664 (1944),

II. CONCEPT OF THE MILITARY AGREEMENT

An examination of the military agreement, as a distinct type of international agreement, will be undertaken in this article from different points of view, and will consequently produce different observations. First, inquiry will be made into the *subject matter* of the military agreements. In this respect the title of the agreement often provides a clue to the areas covered. Headings such as "Status of Forces Agreement," or "Military Rights and Facilities Agreement," as well as "Air Base Agreement," "Infrastructure Agreement," or "Stockpile Agreement" indicate and emphasize the primary fields regulated in the agreement involved. Related matters are also normally included to the extent deemed necessary and feasible within the scope and purview of the agreement. The subject matter of the agreement affects most decisively the *negotiating and concluding* level which forms the next basis from which to consider the nature of the military agreement. The lower or higher level of Government representatives who participate in the negotiation and conclusion of the agreement influences the *legal character* of the military agreement under United States constitutional standards, which, in turn, presents a third point of departure for the analysis of the military agreement. Finally, *the number and character of the contracting parties* to the military agreement merit treatment. Each of the four principal aspects under which the military agreement may be evaluated are discussed in more detail in the succeeding parts of this article.

A. *MILITARY AGREEMENTS AS DETERMINED BY THEIR SUBJECT MATTER*

Military agreements either (1) merely regulate in broad terms the basic legal conditions controlling an American military force stationed in a foreign country and the personal status of its mem-

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acknowledges without comment the subject matter of "military agreements" by referring to the conclusion of numerous agreements with foreign countries covering the movement of armed forces, modi vivendi, or armistices, but he does not use the technical term. In McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L. J. 181 (1945), an extremely authoritative article, the authors use the technical term (54 Yale L. J. at 247, 281) but in passing only. Elbert M. Byrd, Jr., of the University of Maryland, propounding a new theory on the distinction between treaties and executive agreements in his book, Treaties and Executive Agreements in the United States (1960), frequently alludes to military agreements without referring to them by this name and without according them separate status among his ten definitions of agreements.

bers, or (2) comprise all the rights held and obligations assumed by the American military force as well as the facilities granted to it in the foreign host country. The first category may be referred to as "Status of Force Agreements," (SOFA), of which the best known is the North Atlantic Treaty Status of Forces Agreement (NATO SOFA).[2] The second class is preferably referred to as "Military Rights and Facilities Agreements,"[3] or "Base Rights Agreements."[4] An agreement which is all-inclusive, in that it covers the legal conditions govering a force and the personal status of its members, as well as the military rights and facilities of that force in the host country, is, in military parlance, frequently referred to as an "Umbrella" agreement.[5] Finally, there are other types of agreements of a predominantly military nature, *e.g.*, armistice agreements.[6] This article will discuss the first two types of military agreements referred to above as the truly representative classes of those agreements.

B. *MILITARY AGREEMENTS AS DETERMINED BY NEGOTIATING AND CONCLUDING LEVEL*

Military agreements are concluded either on governmental (executive department) or military service level.[7] The first class comprises military treaties, and agreements of overall importance

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[2] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951 [1953] 4 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.

[3] *E.g.*, Agreement With Greece Concerning Military Facilities, Oct. 12, 1953, 4 U.S.T. & O.I.A. 2189, T.I.A.S. No. 2868, 191 U.N.T.S. 319. *Cf.* Agreement Concerning the Status of United States Forces in Greece, Sept. 7, 1956, 7 U.S.T. & O.I.A. 2555, T.I.A.S. No. 3649, 278 U.N.T.S. 141.

[4] *E.g.*, Agreement Relating to Military Bases in Libya, With Memorandum of Understanding, Sept 9, 1954, 5 U.S.T. & O.I.A. 2449, T.I.A.S. No. 3107, 224 U.N.T.S. 217.

[5] Hq. U.S. Air Forces in Europe (USAFE), U.S. Dep't of Air Force, Office Instruction No. 11–33, para. 2c (May 18, 1959) (Negotiations and Military Rights), defines "agreements" as follows: "Written instruments recording the mutual understanding reached between the United States and a foreign state or states, with respect to military rights and obligations (intergovernmental, base rights, or military rights and facilities agreements or arrangements)."

[6] For an exhaustive treatment of this very important and early type of military agreement, see Levie, *The Nature and Scope of the Armistice Agreement*, 50 Am. J. Int'l L. 880 (1956).

[7] See Dep't of Defense Instruction No. 1400.10 (June 8, 1956), as amended, entitled: "Utilization by United States Forces of Local Nationals in Foreign Areas," Part IV (Treaties and Agreements), which states: "A. The establishment of military bases by the U.S. Armed Forces in the territory of another nation is normally governed by the provisions of a treaty or other formal agreement between the two countries. . . . The negotiation of such a basic treaty or agreement is the responsibility of the Department of State. The Department of Defense or its agencies usually participate in the negotiations,

concluded on the State Department level, and hence, may also be called diplomatic agreements. An agreement concluded by the Department of Defense (with the participation of its military departments) would similarly constitute a governmental level agreement. The second class consists of military service agreements which military commanders conclude on various levels. They may be executed by a major overseas commander, such as the Commander-in-Chief, U.S. European Command (CINCEUR), the Commander-in-Chief, U.S. Army, Europe (CINCUSAREUR), the Commander-in-Chief, U.S. Air Forces in Europe (CINCUSAFE),[8] or by commanders subordinate to them. "Lower level" military agreements are consummated by the commander of the immediately subordinate headquarters (such as, in the case of U.S. Army Europe, by the Commander, Seventh Army, or, as in the case of the U.S. Air Force in Europe, by the Commander of Seventeenth Air Force, or Third Air Force). If signed by base commanders they are referred to as "base level" or "local agreements."[9]

Military Rights and Facilities, or Base Rights Agreements, and Status of Forces Agreements are normally governmental level

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however, at least to the extent of furnishing technical advice and guidance to the State Department. . . ." See also Hq. United States European Command (US EUCOM), U.S. Dep't of Defense, Directive No. 30–6, para. 4b (March 14, 1958), which also defines "basic agreement."

[8] See Dep't of Defense Instruction No. 1400.10, *supra* note 7, Part V, and Hq. USAFE Office Instruction No. 11–33, *supra* note 5, para. 2c(2), which define "subsidiary" and "technical" agreements, respectively. The following military agreements implementing the NATO Status of Forces Agreement, *supra* note 2, will serve as examples of service agreements executed by military commanders: Agreement Relating to the Stationing of United States Armed Forces in The Netherlands, With Annex (Exchange of Notes), August 13, 1954, 6 U.S.T. & O.I.A. 103, T.I.A.S. No. 3174, 251 U.N.T.S. 91; Agreement With Turkey Relating to Implementation of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces of June 19, 1951, With Two Minutes of Understanding, June 23, 1954, 5 U.S.T. & O.I.A. 1465, T.I.A.S. No. 3020, 233 U.N.T.S. 189.

[9] Sometimes referred to as "Working Arrangements." See Hq. USAFE Office Instruction No. 11–33, *supra* note 5, para. 2c(3); Hq. US EUCOM Directive No. 30–6, *supra* note 7, paras. 4c and d. Examples of these agreements include: Agreement Between the United Kingdom Post Office and U.S. Forces in the United Kingdom, Sept. 1, 1956; Agreement Regarding the Transport, Burial, and Embalming of Bodies of Members of United States Forces Dying in France, July 1, 1955, 6 U.S.T. & O.I.A. 3787, T.I.A.S. No. 3380, 270 U.N.T.S. 19; Agreement With France Covering the Acquisition, Importation and Ownership of Private Firearms, Feb. 14, 1955. On somewhat lower concluding levels are: Agreement Between the French P.T.T. (Post, Telegraph, and Telephone) Administration and CINCUSAFE, May 31, 1954; Convention Covering the Conditions of Utilization of the Joint Installations of Nice-Cote D'Azur Airport by the U.S. Armed Forces, June 17 and 25, 1959; Agreement Covering Air Accidents on French Metropolitan Territory Involving U.S. Military Aircraft, Nov. 21, 1960.

agreements, frequently in the form of multi-lateral treaties. Implementing Military Agreements, including those of a technical nature (which the State Department prefers to refer to and designate as "Arrangements"), elaborate and carry the foregoing agreements into effect. They will normally be initiated and consummated by the major overseas commander with the corresponding representative of the foreign country concerned (Commander-in-Chief of the Armed Forces, usually identical with the Minister of Defense).

Negotiation of these implementing Military Agreements will ordinarily be monitored, if not actually conducted, by the U.S. Ambassador or other U.S. diplomatic representative to the foreign state involved, who will act with the advice and assistance of the appropriate military authorities.[10] Military implementing agreements, which recite that they are made on behalf of the United States, require a Department of State clearance.[11] Technical military agreements, which stipulate the necessary details for effectuating the higher military rights and facilities agreement on the working level, do not contain the above recital and need not be cleared.[12]

The NATO Special Ammunition Storage Program (SASP) is a good example of the process of negotiating and concluding the various different types of military agreements. The placing of a qualified American custodial detachment in a foreign country requires the conclusion of several agreements. First there is the 144 b Agreement, so-called because it is entered into upon authorization given by the President under Section 144 b of the Atomic Energy Act of 1954.[13] It provides for cooperation by the Defense

[10] Dep't of Defense Instruction No. 1400.10, *supra* note 7, Part I, states: "The Department of Defense or its agencies usually participate in the negotiations, at least to the extent of furnishing technical advice and guidance to the Department of State."

[11] See Dep't of State Circular No. 175, para. 1.1 (Dec. 13, 1955), which states: "The purpose of this circular is to insure . . . (d) that the final texts developed are approved by the interested Assistant Secretaries or their Deputies and brought to the attention of the Secretary or Under Secretary a reasonable time before signature; . . . (f) that, in any case where any other agency participates in negotations, the official or officials representing such agency in the negotiations shall be informed appropriately of the requirements herein as they apply to such negotiations." For the full text of this circular, see 50 Am. J. Int'l L. 784 (1956).

[12] Dep't of State Circular No. 175, *supra* note 11, para. 5.3(b) (Exercise of Authority to Negotiate): "Purely operational *arrangements*, such as Form 10–5 ICA project agreements, procurement authorizations and cash contribution agreements, need not be reported where they are *in implementation of an existing international agreement*" (emphasis added).

[13] Act of Aug. 1, 1946, ch. 724, § 144, added by Act of Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 942, and amended by Act of July 2, 1958, §§ 5–7, 72 Stat. 278, 42 U.S.C. § 2164(b) (1958).

Department with the foreign user-nation in communicating such restricted data as is necessary, *inter alia*, to develop defense plans, train personnel in the employment of and defense against atomic weapons and develop compatible delivery systems for such weapons. A stockpile agreement, like the 144 b Agreement, is also concluded on the governmental level. This agreement carries out the decision of the North Atlantic Council for the establishment of stocks of nuclear weapons which will be readily available for the defense of the North Atlantic Alliance in case of need. A technical agreement is subsequently executed on the military level between the United States and the user-nation, which stipulates the support the user-nation will supply to the U.S. custodial detachment, and the support the U.S. will supply to the user-nation strike commitment and the other mutual responsibilities. Lower level U.S. military commanders then conclude the necessary arrangements with their foreign military counterparts to establish the required local procedures in implementation of the techincal agreement.[14] The Commander-in-Chief in the field or his deputy, who are primarily called upon to execute military implementing agreements, may delegate powers to the commanders of subordinate military headquarters to initiate, discuss and conclude understandings of a limited, technical or local scope with their foreign military or civilian counterpart.

C. *MILITARY AGREEMENTS AS DETERMINED BY THEIR LEGAL NATURE UNDER U. S. CONSTITUTIONAL STANDARDS*

From the United States constitutional point of view, the military agreement may fall within any of the categories of international agreements currently used by the United States in its relations with foreign governments. A military agreement, accordingly, may be a full-fledged treaty within the meaning of the United States Constitution, or an executive agreement, as this term is understood in American law and practice.[15]

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[14] See Hq. 7232d Tactical Depot Group, U.S. Dep't of Air Force, Reg. No. 27–1 (Dec. 20, 1961) (Programming for non-US NATO Custodial Detachment), and Reg. No. 55–1 (Dec. 8, 1961) (Operations-Technical Arrangements). See also Agreement With United Kingdom for Cooperation on the Uses of Atomic Energy for Mutual Defense Purposes, July 3, 1958, 9 U.S.T. & O.I.A. 1028, T.I.A.S. No. 4078, 326 U.N.T.S. 3, as extended and amended, May 7, 1959, 10 U.S.T. & O.I.A. 1274, T.I.A.S. No. 4267, 351 U.N.T.S. 458.

[15] Dep't of State Circular No. 175, *supra* note 11, para. 3 (Scope of the Executive Agreement-Making Power), states: "Executive Agreements shall not be used when the subject matter should be covered by a treaty. The executive form shall be used only for agreements which fall into one or more of the following categories: a. Agreements which are made pursuant to or in

The power to make either of the above types of international agreements rests in the President. A treaty can only be made by the President pursuant to the provisions of Article II, Section 2, Clause 2, of the U.S. Constitution, and subject to the concurrence of the U.S. Senate. Other types of intergovernmental agreements need not meet this technical constitutional requirement. A self-executing treaty becomes the supreme law of the land immediately upon ratification. Such a treaty is then superior to State laws and State constitutions, without any further legislative enactment by the U.S. Congress.[16] Congress must, however, enact the necessary and proper laws for carrying out an executory treaty.[17] Executive Agreements, on the other hand, are all those intergovernmental agreements between the United States and foreign countries which do not require the advice and consent of the Senate.[18] Power to conclude executive agreements is vested

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accordance with existing legislation or a treaty; b. Agreements which are made subject to Congressional approval or implementation; or c. Agreements which are made under and in accordance with the President's constitutional power."

The Harvard *Draft Convention on the Law of Treaties, supra* note 1, states: "The term 'executive agreement' is one of popular usage solely and no instrument is known which by its own terms has ever been so designated." See also Myers, *The Names and Scope of Treaties*, 51 Am. J. Int'l L. 606 (1957). Byrd maintains that the term "executive agreement" describes, in all-inclusive manner, international agreements excepting treaties or compacts. Byrd, *op. cit. supra* note 1, at 202.

[16] "The binding force of a treaty concerns in principle the contracting States only, and not their subjects. . . . This rule can . . . be altered by the express or implied terms of the treaty, in which case its provisions become self-executory. Otherwise, if treaties contain stipulations with regard to rights and duties of the subjects of the contracting States, their courts, officials, and the like, these States must take such steps as are necessary, according to their Municipal Law, to make these stipulations binding upon their subjects, courts, officials and the like." I Oppenheim, International Law § 520, at 829–30 (7th ed. Lauterpacht 1948). "Treaties may be enforced by the courts without legislative enactment when they are self-executing." 5 Hackworth, Digest of International Law § 488, at 177 (1943), and the pertinent authoritative statements and Supreme Court decisions cited therein. Byrd, *op. cit. supra* note 1, at 202, offers specific definitions for the self-executing and the non-self-executing treaty.

[17] U.S. Const. art. I, § 8. "When the subject matter of the treaty falls within the ambit of Congress's enumerated powers (those listed in the first 17 clauses of Article I, Section 8 of the Constitution), then it is these powers which it exercises in carrying such treaty into effect. But if the treaty deals with a subject which falls normally to the States to legislate upon, or a subject falls within the national jurisdiction because of its international character, then recourse is had to the necessary and proper clause." Legis. Ref. Serv., Library of Congress, The Constitution of the United States of America, Revised and Annotated 426–27 (Corwin ed. 1953) (S. Doc. No. 170, 82nd Cong. 2d Sess.).

[18] "The distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance." *Draft Convention on the Law of Treaties, supra* note 1.

in the President under authority specifically conferred upon him by Congressional enactments or by virtue of his inherent powers. These are the powers to enforce the laws (Article II, Section 3, U.S. Constitution), to appoint and remove officers of the United States (Article II, Section 2, Clause 2, U.S. Constitution), to direct the foreign affairs of the United States (Article II, Section 1, Clause 1; Section 2, Clause 2; and Section 3, U.S. Constitution) and to command the U.S. Armed Forces (Article II, Section 2, Clause 1, U.S. Constitution). For practical purposes it is generally accepted that treaties are reserved for the conclusion of international political agreements on objects of high dignity. Executive agreements are usually informal bilateral understandings with foreign governments and their agencies, relating to objects of legal importance such as matters of trade, which do not require serious consideration by the U.S. legislature.[19] In a wider sense, treaties and other international agreements could be referred to as military agreements whenever they *relate in some manner to military subjects* or *matters of military interest.* In a more limited and proper sense, military agreements are, however, only those agreements which deal *exclusively with military matters or military interests.* They are frequently concluded by the President, under his power as Commander-in-Chief of the U.S. Armed Forces, or are executed in his name by his commanders in the field. This raises the question of delegation of authority for concluding agreements and the problem of the proper level for negotiating, executing, and implementing military agreements.

D. *MILITARY AGREEMENTS AS DETERMINED BY NUMBER AND CHARACTER OF THE PARTIES THERETO*

The military agreements herein discussed are international agreements, and, therefore, do not include the so-called "inter-service agreements," which are understandings between diffierent agencies of the U.S. military establishment itself[20] or between the Department of Defense and one or more of the other U.S. executive departments.[21] If the parties to military agreements

[19] *Cf.* Lissitzyn, *Duration of Executive Agreements,* 54 Am. J. Int'l L. 869–70 (1960).

[20] *E.g.,* USAREUR-USAFE Agreement for Mutual Use of Airfields in Germany, April 2 and 7, 1955, signed by the Commander-in-Chief, United States Army, Europe (CINCUSAREUR), and the Commander-in-Chief, United States Air Forces in Europe (CINCUSAFE).

[21] *E.g.,* Postal Agreement Between the Post Office Department and the Department of Defense, Feb. 2, 1959 (providing military postal services at locations where the U.S. civil postal service does not have authority to operate, or where military requirements exist, etc.).

are the United States on one side and one foreign country on the other side, the agreement is called a "bilateral agreement."[22] Where several countries join with the United States in describing and defining mutual rights and obligations, the resultant agreements are called "multi-lateral." A distinction could possibly be made between multi-lateral treaties of a mutually reciprocal character, such as the NATO SOFA, in which each and every party is bound to the other by the same set of rules, and those in which a plurality of parties on one side faces only one party on the other side.[23]

The level of the specific governmental office negotiating and concluding a military agreement is also a factor in determining the character of the agreement. Thus where, for example, negotiations for military rights for U.S. forces stationed in foreign countries have been monitored or fully conducted by the U.S. Ambassador, or other U.S. diplomatic representative, with the Minister of Foreign Affairs of the foreign state or states involved, a military agreement on a governmental level will result.[24] An agreement on the military service level is concluded between the U.S. major overseas commander and the Commander-in-Chief of the Armed Forces of the foreign state concerned, or, in all probability, the Minister of Defense. In this case, the U.S. representative would be a lower public official than the representative

[22] *E.g.*, Agreement Relating to Military Bases in Libya, *supra* note 4; Agreement Relating to the Establishment and Operation of a Communications Center at Peshawar, With Minute of Understanding and Exchange of Letters (Exchange of Notes), July 18, 1959, 10 U.S.T. & O.I.A. 1366, T.I.A.S. No. 4281, 355 U.N.T.S. 367; Defense Agreement With Spain, Sept. 26, 1953, 4 U.S.T. & O.I.A. 1895, T.I.A.S. No. 2850, 207 U.N.T.S. 83.

[23] *E.g.*, Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany, with annexes, May 26, 1952, as amended by the Paris Protocol, Oct. 23, 1954 [1955] 6 U.S.T. & O.I.A. 4278, T.I.A.S. No. 3425, 332 U.N.T.S. 3, and as supplemented by the Convention on the Presence of Foreign Forces in the Federal Republic of Germany, Oct. 23, 1954 [1955] 6 U.S.T. & O.I.A. 5689, T.I.A.S. No. 3426. Parties are, on the one hand, France, the United Kingdom, and the United States, and, on the other hand, the Federal Republic of Germany. A new agreement, Agreement to Supplement the NATO SOFA With Respect to Foreign Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, commonly called the Supplementary Agreement, together with the NATO SOFA, will replace the older agreements upon ratification. These new agreements are termed the German Forces Arrangements (GFA), and Belgium, Canada, and The Netherlands, as well as the aforementioned nations, will be parties thereto.

[24] For example, see Agreement Relating to the Stationing of United States Armed Forces in The Netherlands, *supra* note 8; Agreement With Turkey Relating to Implementation of the NATO SOFA, *supra* note 8; Agreement Relating to the Establishment and Operation of a Communications Center at Peshawar, *supra* note 22.

of the foreign contracting state.[25] On still lower levels, the commander of a subordinate headquarters in the field, or a base commander, may also execute military arrangements with their foreign counterparts. A military agreement of particularly specialized nature is that concluded by a major overseas commander (or his subordinate commander in the field) with his counterpart in the allied military service concerned, for the furnishing of services and resources, normally on a reciprocal basis. Such agreements, under authority and in implementation of a higher level agreement,[26] are ordinarily limited in scope to the provision of logistical support, and are called "cross-service" or "cross-servicing" agreements. The best examples are offered by the mutual assistance agreements of several allied air forces in their flying operation and maneuvers, or other activities, transgressing the borders of sovereign states. Such a cross-servicing agreement will, as a rule, provide that the air force of one country shall be entitled to refueling, POL (Petroleum, Oil, Lubricants) provisions, and other logistical support from an air base in another allied country forming the stop-over or the destination of the flying operations involved.[27]

III. FORCE AND EFFECT OF MILITARY AGREEMENTS

Under this topic, chief consideration will be given to the relationship between the military agreement and internal laws and regulations. The effect of the military agreement will primarily

[25] An example is the Arrangement for the Transfer of Certain U.S. Radar Stations in the Federal Republic of Germany, signed by Franz Josef Strauss, Minister of Defense of the Federal Republic of Germany on July 19, 1959, and by Lt. General Frank F. Everest, Commander-in-Chief, United States Air Forces in Europe, for and in behalf of the United States Forces in Germany, on July 21, 1959. It is to be noted that under the German Basic Law, the Federal Minister of Defense is the Commander-in-Chief of all German Armed Forces; his counterpart in the United States is the President. In the same category is the Agreement of 5 November 1953 Between the Government of the French Republic and the Supreme Allied Commander Europe (SACEUR) Regarding the Establishment and Operation in France of the Supreme Headquarters and Subordinate Headquarters, which was signed by M. Jean Mons, Permanent Secretary General of National Defense, in behalf of France, and by Lt. General C. V. R. Schuyler, Chief of Staff, Supreme Headquarters Allied Powers Europe (SHAPE), in behalf of SACEUR.

[26] An example of such a higher level agreement is the NATO-Military Agency for Standardization (MAS)-Standardization Agreement, subject: Standard Procedures for Demand, Issue and Repayment for Facilities Granted to Visiting Personnel and Military Aircraft of NATO Nations on NATO Airfields and Military Airfields within NATO Countries, STANAG No. 3113, October 15, 1956.

[27] *Cf.* Aviation POL Cross-Servicing Arrangement between the USAFE and the Royal Hellenic Air Force, August 19, 1958.

depend on its character under American constitutional standards and requirements.

The provisions of a military treaty, whether self-executing or executory in nature, unless violative of the Constitution or inconsistent with the public policy of the United States, will be on an equal footing with Congressional enactments. The provisions of such a treaty will supersede laws preceding the treaty in time of enactment, but will be subject to abrogation or modification by subsequent Congressional legislation, provided that such a purpose on the part of Congress has been clearly expressed in the legislation.[28] However, no treaty has as yet been invalidated by the Supreme Court on the grounds that it was in violation of the Constitution. The Supreme Court has, however, rendered inoperative specific provisions of a treaty by setting aside Congressional legislation enacted for the purpose of effectuating the provisions of the treaty involved.[29]

No specific statement comparable to that respecting treaties is made in the Constitution relative to executive agreements; consequently in no case will executive agreements have more force and effect than treaties. A military agreement concluded under the authority of a Congressional enactment will undoubtedly supersede inconsistent laws enacted earlier in time but will not prevail against such inconsistent laws passed subsequent to its effective date.[30]

Whether *routine* executive agreements concluded by military authorities will also supersede prior, conflicting statutes is still unresolved. Non-military executive agreements, concluded under the inherent powers of the President, have been declared by the Supreme Court to be on parity with treaties as the supreme law of the land.[31] The same rule of supremacy established for treaties

[28] One of the best of the more recent expressions of the Supreme Court on the subject is Reid v. Covert, 354 U.S. 1 (1957). The Court confirmed therein that it has regularly and uniformly recognized the supremacy of the Constitution over a treaty; that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty; and that when a statute which is subsequent in time is inconsistent with a treaty, the statute renders conflicting portions of the treaty null. Executive agreements, the Court held, cannot rise to a greater stature than treaties. See also 41 Op. Att'y Gen. No. 27 (1954).

[29] See New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). *Cf.*, however, Missouri v. Holland, 252 U.S. 416 (1920) and United States v. Curtiss-Wright Corp. 299 U.S. 304 (1936).

[30] An excellent illustration in point is offered in Wilson v. Girard, 354 U.S. 524, at 530 (1957).

[31] United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).

by express language in the Constitution would result, the Court held, in the case of all international compacts and agreements, from the very fact that complete power over international affairs is vested in the national government and cannot be subjected to any curtailment or interference on the part of a State or several States.[32] The Supreme Court decision is based on the determination that complete power over international affairs is possessed by the national government. This ruling would seem to apply to all agreements which are military in subject matter and which have been concluded by the President under his power to direct the foreign affairs of the United States.

In this connection, the Supreme Court decisions[33] declaring paragraph 11, Article 2 of the Uniform Code of Military Justice,[34] to be in violation of Article III and the Fifth and Sixth Amendments of the United States Constitution merit attention. In those decisions the Supreme Court made repeated and pointed reference to pertinent provisions of applicable international agreements, yet it did not consider that these provisions strengthened the disputed power of the military to include civilians accompanying the forces during peacetime in the category of persons subject to the UCMJ. If ever confronted with the task of having to adjudicate the domestic validity of the provisions of an executive military agreement should they be attacked because of their inconsistency with directives of the Constitution, the Supreme Court would undoubtedly uphold the Constitution and declare any conflicting provisions of the agreement invalid. The Supreme Court might, of course, prefer to follow its traditional attitude, which is to avoid the constitutional issue, rather than to declare a treaty unconstitutional, and thereby avoid embarrassing the government in its relations or intercourse with other countries.[35]

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[32] *Ibid.*

[33] Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Wilson v. Bohlender, 361 U.S. 281 (1960).

[34] Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Re-enacted in 1956 as 10 U.S.C. §§ 801–940. Act of Aug. 10, 1956, § 1, ch. 1041, 70A Stat. 1, 36–79 (effective Jan. 1, 1957) (hereinafter referred to as the UCMJ or the Code and cited as UCMJ, art. ___).

[35] Mackenzie v. Hare, 239 U.S. 299 (1915). In discussing the powers of the United States in an expatriation case involving an American-born woman who, in marrying a foreigner, forfeited her citizenship, the Court said: "But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers." 239 U.S. at 311.

American courts are inclined to void an executive agreement if it has to do with subject matter over which the Constitution vests control in Congress, and not in the Executive branch.[36] In the case of military agreements, such a subject matter might be the disposition of military property of the U.S. Government, or of appropriated money of the Defense Department, as to which the Constitution vests exclusive control in the Congress (Article I, Section 9, Clause 7; Article IV, Section 3, Clause 2). The Constitution is, however, silent as to the *method* of disposing of property of the United States. In view of the Constitutional power of Congress relating to the United States military establishment (Article I, Section 8, Clauses 11 to 14, U.S. Constitution), a competitive situation could arise between Congress and the Executive in this respect. Considering that international agreements are basically contracts between sovereign governments which, upon ratification, become domestic law, the ordinary rules of interpretation may safely be applied in such a case. Under these rules those legal provisions later in time would supersede prior conflicting rules of equal dignity and authority, provided that they are no more specific than the former. It must also be remembered that military executive agreements, concluded on the highest level by the President as Commander-in-Chief in furtherance of military objectives, have been considered principally to involve political determinations which are not justiciable.[37]

The preceding discussion deals with the relative effectiveness of an executive military agreement concluded on the Presidential level, in light of relevant provisions of the Constitution and Congressional enactments. The question of the efficacy of the provisions of executive military agreements becomes more acute when they have been concluded at a lower level. The force and effect of such lower level, often routine, executive military agreements, where they face conflicting prior Congressional legislative enactments, is uncertain. Foreign governments are, in general, under international law, entitled to depend upon the appointment of officers as authorized diplomatic agents of a country, and to rely on their actions as representing the will of the nation for which they act. Such officers may subsequently be determined to have been incompetent under the law of their state to perform the given act. In that event, the foreign contracting party may demand redress for any damage suffered, because it could contend

[36] *Cf.* United States v. Capps, 204 F.2d 655 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955).

[37] See Hirota v. MacArthur, 338 U.S. 197 (1948).

that it acted reasonably in relying on the representation of competence made by that organ or authority.[38] Such competence will often depend on a proper delegation of the requisite powers from the authority which holds those powers under the Constitution to subordinate officers or agencies.

IV. DELEGATION AND GRANT OF POWERS TO CONCLUDE MILITARY AGREEMENTS

The original power to conclude military agreements, *i.e.*, treaties of a military nature and executive military agreements, stems from the Constitutional power of the President to command the United States Armed Forces (Article II, Section 2, Clause 1, U.S. Constitution) and to represent the nation in foreign affairs (Article II, Section 1, Clause 1, U.S. Constitution). The authority, on the other hand, to conclude military agreements on any level lower than the Presidential level, must be found either (1) in a delegation by the President of his original power, by means of specific directives[39] or in provisions of military agreements of the highest order (*i.e.*, treaties or executive military agreements on the Presidential level);[40] or (2) in Congressional actions.[41] A common method of delegating powers is to set up the requisite delegation of powers through a link of two or more agreements on several descending levels. In this respect, military agreements of different kinds may come into play. A general delegation of powers from the military superior to his subordinates will frequently include those powers which are required for the negotiation and conclusion of military agreements.[42]

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[38] 5 Hackworth, *op. cit. supra* note 16, § 485, at 153; 29 Am. J. Int'l L. 992 (Supp. 1935); Schwarzenberger, A Manual of International Law 39–40, 63 (1952); Blix, Treating Making Power 387–88 (1960).

[39] Congress has granted authorization to the President to delegate functions. 3 U.S.C. § 301 (1958). The background of that section is explained in the President's message on the bill reorganizing the Department of State, as follows: "The foreign affairs activities of this Government are carried on by a number of agencies, but the greatest share of responsibility is borne by the Department of State. Moreover, the President, and the Congress as well, rely upon the Secretary of State to provide leadership among the Government agencies concerned with various aspects of foreign affairs and to recommend the steps necessary to achieve an integrated and consistent foreign policy." 1949 U.S. Code Cong. & Ad. News 1292. Numerous executive orders were issued under the above authorization, *e.g.*, Exec. Order No. 10250, June 5, 1951; Exec. Order No. 10289, Sept. 17, 1951. See also 3 U.S.C. § 302 (1958), entitled: "Scope of delegation of functions," which appropriately qualifies the preceding section.

[40] See the agreements and arrangements cited in note 9 *supra*.

[41] See Act of Sept. 4, 1961, 75 Stat. 445, 22 U.S.C. § 2381 (Supp. III, 1961).

[42] Under USAFE Reg. No. 23–2, para. 4b (July 1, 1961), the (subordinate) Commander, Seventeenth Air Force is authorized to "Represent the

A special problem is presented by that widely used and extremely important delegation of Presidential powers which is not expressed in written directives, provisions of agreements or legislative enactments, but which is presumed under a theory known as the "Alter Ego" doctrine. This theory operates so as to place legal sanction on action taken by the Secretaries on behalf of the President. This sanction is particularly necessary for the actions which the Secretary of Defense must take in the name of the President, because of the fact that the President could not possibly carry out in person all the acts which are within his responsibility. Under this doctrine any acts carried out by the heads of executive departments in exercising the authority of the President, vested in him by the Constitution or by Congress, are presumed to be the acts of the President himself.[43] Where an action is specifically charged to the President in person, or to the President and the Secretary of Defense jointly, the Secretary is by inference barred from action for the President as his alter ego. The doctrine, further, does not ordinarily extend to the subordinates of the Secretary of Defense, insofar as they do not stand in the status of alter ego of the President. These subordinates may, however, act pursuant to the direction of the President. The doctrine, therefore, serves to cover those in-between areas where pertinent statutes do not specifically delegate authority to the Secretary of Defense to act for the President. The Act of October 31, 1951,[44] generally authorizes delegation of Presidential function and hence appears to adopt the alter ego doctrine.

CINCUSAFE, as directed, in military discussions pertaining to implementation of government-level agreements," and in para. 5*q*, to "Negotiate cross-servicing arrangements with Allied or host nations, and other US agencies as directed." In like manner, the Commander, Third Air Force, another subordinate commander of CINCUSAFE, is authorized in USAFE Reg. No. 23–13, para. 4a (May 16, 1961), to "Represent USAF and other US Armed Forces in negotiations with the British Air Ministry and with appropriate military and civilian agencies as necessary or as directed." A support group may have negotiating authority. The Detachment 1, 7260 Support Group Commander (USAFE French Liaison Office) is directed in USAFE Reg. No. 23–7, para. 4a(2) (Feb. 1, 1962), to "Negotiate with French governmental, military and civilian agencies as directed by CINCUSAFE and as agreed by the French Liaison Mission."

[43] The Supreme Court stated this theory with respect to the Secretary of War (Army, now Defense) in United States v. Eliason, 41 U.S. (16 Pet.) 291, 301 (1842): "The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority."

[44] 3 U.S.C. § 301 (1958).

V. LIMITATIONS UPON THE AUTHORITY TO CONCLUDE MILITARY AGREEMENTS

Military commanders at various levels are vested with powers to negotiate and conclude military agreements or arrangements of a more limited scope. Limitations upon the powers of the superior commander will restrict those of the lower level commander in addition to the restrictions peculiarly applicable to him. Three categories of limitations on those powers may be distinguished:

(1) Limitations upon the powers of the President as a military Commander-in-Chief.

(2) Limitations upon the powers of a military Commander-in-Chief in the field.

(3) Limitations upon the authority of local military commanders.

A. *LIMITATIONS UPON THE PRESIDENT*

The Presidential military agreement cannot go beyond those powers of the President which are exclusively vested in him by the Constitution. Thus, where a combination of Presidential and Congressional powers required because the issues involved are of a legislative nature, Congressional action will be necessary. This will be particularly true of any agreement which calls for implementation in the financial area. In those cases the military agreement will remain valid for domestic purposes, if it is based on prior Congressional authority or if it has received subsequent Congressional sanction. Ultimate judgment on the validity of such an agreement will be rendered by the Supreme Court in its construction and interpretation of pertinent Constitutional provisions.

As heretofore noted, the Supreme Court held that the provisions of the Uniform Code of Military Justice, which provided that civilians serving with, employed by, or accompanying the U.S. Forces in overseas territories were to be subject to U.S. courts-martial jurisdiction in peace-time, were unconstitutional.[45] Although this decision may appear to affect only the internal organization of the armed forces, in practice it pointed up the limitations which the Constitution, as construed and interpreted by the Supreme Court, imposes upon the powers of the Executive and his representatives in the field of military foreign affairs.

[45] See cases cited in note 33 *supra*.

Under the provisions of the Code the amenability of camp followers to courts-martial jurisdiction was specifically subject to the provisions of any treaty or intergovernmental agreement, or pertinent provisions of international law. Yet, the fact that numerous agreements of this type (including the NATO Status of Forces Agreement)[46] subjected civilian employees of the U.S. Armed Forces to courts-martial jurisdiction did not prevent the Supreme Court from eliminating these civilian from trial by courts-martial. However, the Court did not expressly hold the pertinent provisions of the intergovernmental agreements to be in violation of the Constitution. The foregoing result was reached by reason of the fact that the amenability of civilians to courts-martial in these agreements is predicated on the existence of complementary provisions in the domestic law of the sending state. Where, under the sending state's law the civilian employee is not subject to the jurisdiction of military tribunals, the pertinent clause of the intergovernmental agreement is rendered inoperative because the requisite complementary provision in the law of the sending state is lacking.

Another limitation on Presidential powers as Commander-in-Chief is illustrated by the legal nature and method of United States participation in NATO mutual defense plans and measures. Ratification of the North Atlantic Treaty[47] imposed on the United States and other NATO countries the obligation to maintain and develop, separately and jointly, the individual and collective capacity to resist armed attack by means of continuous and effective self-help and mutual aid. The North Atlantic Council (NAC), established under Article 9 of the Treaty, recommends measures for the implementation of the provisions of the North Atlantic Treaty on self-help and mutual aid. By its approval of the North Atlantic Treaty, however, the United States did not commit itself to ratify any and all programs proposed by the North Atlantic Council or its subsidiary agencies or to agree to any particular type of assistance. Nor has the North Atlantic Council power to take decisions binding on the participating governments.[48] Through its representatives in the NAC and

[46] See NATO SOFA, *supra* note 2, art. VII, para. 1(a); Agreement Relating to Military Bases in Libya, *supra* note 4, art. XX(1).

[47] April 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243.

[48] "NATO is not a 'supergovernment.' It cannot tell member states what to do or compel any state to abide by its decisions. . . .NATO agreements are therefore voluntary. . . . The North Atlantic Council has no powers to make its decisions binding on member governments. It is an organization through which the governments themselves can reach voluntary agreements with one another." U.S. Dep't of State, Publication No. 6467, North Atlantic Treaty Organization—Its Development and Significance 14–15 (1957).

subordinate committees, the United States shares in the development of mutual defense measures and subsequently adopts recommended NATO plans and measures by means of a treaty or executive agreement. Depending on the nature of these defense plans and measures, a Presidential agreement concluded by the President under his Constitutional powers, with or without reference to the general authority contained in the North Atlantic Treaty, will often suffice. In many instances the adoption of NATO plans may require Congressional action (resolution or legislation) either authorizing, or else approving, the necessary international agreement, or executing it in the domestic field.[49] Under certain conditions, consummation of a full-fledged treaty will be indispensable. All these agreements or treaties will bear the characteristics of a military agreement as herein discussed.

B. *LIMITATIONS UPON THE MILITARY COMMANDER*

The power of a Commander-in-Chief or of any other military commander in the field to conclude military agreements or arrangements originates in the powers of the President under the Constitution. These powers are, accordingly, subject to the same limitations as those applicable to the President himself. In addition, the powers of a commander in the field to conclude military agreements or arrangements will be further restricted by the scope of the prerequisite delegation of the Presidential authority upon him. His powers will finally be delimited, as a matter of course, by the subject matter and the objectives of the contemplated military agreement or arrangement which he is called upon to conclude. The limitations resulting from these two interrelated, and sometimes conflicting factors, will apply especially in those instances where the military commander is required to implement specific provisions of a government-level military agreement which the United States Government, acting through the President, has concluded with a foreign country.[50]

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[49] See United Nations Participation Act of 1945, ch. 583, § 2, 59 Stat. 619, as amended, 22 U.S.C. §§ 287(a)–(f) (1958).

[50] The best-known example is the NATO SOFA, *supra* note 2, which first 12, later 14 and now 15 countries, concluded in order to define the rights and duties and the legal status of the military forces of one NATO country when stationed in the territory of another such country. This agreement was signed by the plenipotentiaries of the signatory Governments and duly ratified by the United States with the advice and consent of the U.S. Senate. In numerous instances, the agreement contemplates the conclusion of further implementing arrangements, frequently on a military level. See NATO SOFA, art. V; para. 10(b), art. VII; para. 3, art. IX; para. 7, art. X; para. 10, art. XI; and para. 11, art XII.

C. *LIMITATIONS UPON THE LOCAL COMMANDER*

Because of its strictly limited nature, the authority of a local military commander to conclude military arrangements on his level is preferably defined in a negative rather than affirmative manner. A local military commander has no authority to conclude any military arrangements other than those which necessarily result from his responsibility to implement higher level agreements or arrangements. Usually no implicit authority is accorded the local military commander, it being necessary for him to seek an express grant of authority before taking steps to conclude such arrangements. Such authority may be recorded in the controlling higher level agreement by means of a provision empowering local commanders to arrange for the more detailed regulation of given subjects.[51] Otherwise, the local military commander must obtain delegated authority of a limited nature from his superior level commander relating to the specific subject matter of the contemplated arrangement. He may, however, negotiate and conclude limited working arrangements with the foreign local public authorities such as the Mayor of a town, or the Captain of the local Police precinct, on matters directly affecting the troops, installations and military property under his command, unless higher authorities expressly reserve the subject matter involved. Permissible local working arrangements will extend to subject matters within the commander's regular military authority, such as discipline, military affairs and supplies.

VI. CONCLUSIONS

Although its genesis may be traced backward in history, the military agreement has only recently reached the status of a specific category of agreements of major proportion and signifi-

[51] Thus the Government level agreement, relating to the transfer to the Federal Republic of Germany of the air bases at Landsberg, Kaufbeuren, and Fuerstenfeldbruck and the air depot at Erding, was accomplished by exchange of notes at Bonn (United States Embassy Note No. 257), December 10, 1957, 8 U.S.T. & O.I.A. 2457, T.I.A.S. No. 3968, 307 U.N.T.S. 59. It established the ground rules for the transfer of the so-called Four Base Complex to the German Armed Forces and provided in paragraph XI: "Subsidiary implementing arrangements necessary to carry out the terms of this agreement will be concluded by the appropriate authorities of our two governments." Pursuant to the foregoing authorization, The German Federal Minister of Defense and the Commander-in-Chief of the United States Air Forces in Europe (CINCUSAFE) executed the Technical Arrangement for the Transfer and Joint Use of Erding, Fuerstenfeldbruck, Kaufbeuren and Landsberg Air Bases on December 12 and 13, 1957, a military level agreement. It provides in many instances for further arrangements on still lower levels.

cance. Many facets, not dealt with herein, or mentioned in passing only, offer themselves for further treatment. It is hoped that this article will serve as a beginning for further fruitful legal explorations into the field of military agreements.

FOREIGN MILITARY LAW NOTES*
A REVIEW OF DUTCH MILITARY LAW**

BY MAJOR JOZEF SCHUURMANS***

I. INTRODUCTION

The criminal law of the Netherlands is governed by the principle that no act is punishable unless proscribed by a penal article enacted before the commission of the offense (*nullum delictum, nulla poena sine praevia lege poenali*). Thus, there are no common law (*droit coutumier*) crimes in Dutch penal law.

In this article Dutch criminal law will be divided into general penal law and military penal law. General penal law is the penal law applicable to all persons on Dutch territory, and military penal law is the penal law that ordinarily is applicable to military personnel only. (In special circumstances defined by the Code, however, civilians may also be subject to some penal provisions of military law and thus subject to court-martial jurisdiction.)

The military penal code provides that, with certain exceptions, the penal provisions of state, provincial, and muncipal laws are applicable to military personnel. Since the members of the Dutch armed forces are thus subject to the general penal law as well as to the military penal law, the military penal code provides only for purely military offenses and for certain modifications in the application of the general penal law.

Offenses under the Dutch general penal law are divided into crimes (serious offenses) and infringements (offenses not of a

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** The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other government agency or any agency of the Kingdom of The Netherlands.

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serious nature). In military law, however, the distinction is between crimes and disciplinary offenses. The codes of military penal law and of discipline are the same for the Army, Navy, and Air Force.

II. CODE OF MILITARY DISCIPLINE

Minor offenses against military discipline are not covered by the Code of Military Penal Law and are punishable by means of disciplinary punishment only. The Code of Military Discipline, rather than defining all these minor infringements, called disciplinary offenses, gives the following definition of a disciplinary offense: any act contrary to an order or service regulation, or incompatible with military discipline or order, and not proscribed by any penal law. Disciplinary offenses proper can never give rise to trial by court-martial but are disposed of by a commanding officer who is competent to impose disciplinary punishment. On the other hand, persons charged with crimes (offenses against general, as well as military, penal law) can be tried by court-martial. Trial by court-martial is not the exclusive means of imposing punishment for the commission of a crime, for despite the fact that acts that constitute crimes under the penal laws are excluded from the category of disciplinary offenses, it is possible to dispose of a number of criminal offenses by means of disciplinary punishment. The crimes that can be handled in this manner are enumerated in the Code of Military Discipline and are called disciplinary offenses "improper."

Depending upon the circumstances, an act may be a disciplinary offense proper, a crime capable of being disposed of by either disciplinary punishment or court-martial trial, or a crime that can only be tried by court-martial. For example, absence without leave in time of peace is (a) a disciplinary offense only, if the absence does not exceed twenty-four hours, (b) a crime subject to disposition be either disciplinary punishment or court-martial trial, if the absence is greater than twenty-four hours but does not exceed thirty days, and (c) a crime that can only be tried by court-martial, if the absence exceeds thirty days.

The Code of Military Discipline specifies the officers who may impose disciplinary punishment, prescribes the various disciplinary punishments that can be imposed, and contains procedural rules.

If a superior witnesses the commission of a disciplinary offense by a subordinate, he is required to take appropriate measures to quell the disturbance. If he deems it necessary, he may report the

incident to the offender's commanding officer, and as a precautionary measure he may order the offender into arrest.

There are different disciplinary punishments for soldiers, noncommissioned officers, and officers. The punishments also differ depending upon whether it is peacetime or a time when troops are in the field. The most important peacetime disciplinary punishments, with the type of personnel upon whom each kind can be imposed, are:

Official reprimand	Soldiers, noncommissioned officers, and officers.
Confinement to barracks after service hours—not exceeding twenty-one days.	Soldiers and noncommissioned officers.
Confinement to tent, bivouac or home after service hours—not exceeding fourteen days.	Officers.
Solitary confinement after service hours—not exceeding fourteen days.	Soldiers and noncommissioned officers.
Confinement to tent, bivouac or home day and night—not exceeding fourteen days.	Officers.
Confinement day and night—not exceeding fourteen days.	Soldiers and noncommissioned officers.
Reduction in rank to private soldier	Noncommissioned officers.
Reduction in class	Soldiers.
Confinement to a class of discipline for three to twelve months.	Soldiers.

The power to impose disciplinary punishment is given only to general officers and to officers commanding formations that are enumerated either in the code or by regulation of the Queen. General officers and division, brigade, and regimental commanders may impose any type of disciplinary punishments permitted by law. Commanders of battalions, companies, and equivalent formations may not impose the most severe punishments (confinement of officers to barracks or tent day and night; reduction in class or rank; confinement in a class of discipline). Disciplinary punishment may only be imposed on military personnel who are under the actual command of the officer imposing the punishment.

The punishment imposed and a short statement of the offense are recorded in the offender's record of disciplinary punishments and forwarded for approval to the next higher commanding officer, who may suspend, mitigate, set aside, or increase the punishment.

An appeal, called a complaint, may be taken to the next higher authority and then to the High Military Court, which is the final appellate body for both disciplinary punishment and courts-

martial. An appeal may be taken only within the time limit set by law. After a complaint has been filed, the commanding officer cannot alter the punishment; he may only suspend the execution of the punishment if he deems such action necessary. The authority to whom an appeal is taken can mitigate or set aside the punishment but cannot increase it.

The fact that a complaint is determined to be without merit cannot, of itself, subject the complainant to punishment, but one who files an unreasonable or indecent complaint may thereby subject himself to further disciplinary punishment.

When a criminal offense is disposed of by means of disciplinary punishment, a report must be sent to the Commanding General—the authority who decides whether a case shall be referred for trial by court-martial. Notwithstanding the imposition of disciplinary punishment, he may refer the case for trial by court-martial if he deems such action necessary. The disciplinary punishment is taken into account in the court-martial proceedings, though.

The opposite situation may occur also. When a case has not yet been disposed of by disciplinary punishment, the Commanding General or a court-martial may determine that disciplinary punishment would be an adequate remedy and submit the case to the proper commanding officer to handle the matter disciplinarily, since courts-martial may not impose disciplinary punishment.

III. COURTS-MARTIAL

Jurisdiction. With two exceptions, courts-martial have exclusive jurisdiction to try military personnel for offenses against civil as well as military criminal law. The exceptions are (a) offenses against tax laws and (b) civil offenses committed by civilians and military personnel together as accomplices. Trial is held in civil court in these two situations.

Procedure. In the Netherlands legal system procedural rules are enacted in codes—separate codes for civil courts and for courts-martial. Military procedure is contained in the code of military legal procedure for Army and Air Force courts-martial, the code of military legal procedure for Navy courts-martial, and the code of military legal procedure for the High Military Court. The differences between the Navy and the Army-Air Force procedural codes are not very significant.

Types of Courts. In peacetime there are three permanent courts-martial established by the Queen, the jurisdiction of each

extending to a section of Dutch territory. Their jurisdiction is limited to military personnel, below the rank of senior officer, who are members of formations encamped within the respective geographical jurisdictions.

When the Army or a part of it is mobilized and in the field, the Queen may order the establishment of field courts-martial, which are also permanent in the sense that they are not created on a case-by-case basis but are set up for the duration of the mobilization. Jurisdiction extends to persons under the command of the Commanding General, irrespective of the rank of the accused.

Additionally, when troops are surrounded or placed in similar circumstances, the commanding officer may establish temporary courts-martial.

Appeals. Both the accused and the public prosecutor may appeal to the High Military Court from sentences of permanent courts-martial and from those sentences of field courts-martial which are imposed for offenses not committed in time of actual war. There is, however, no appeal from sentences of field courts-martial for offenses committed in time of actual war and from sentences of temporary courts-martial. These sentences, though, cannot be executed without the approval (*fiat executio*) of the Commanding General. If the fiat is refused, the decision rests with the Queen, who may order a rehearing of the case by the High Military Court. Moreover, in trials by field courts-martial for offenses committed in time of actual war the right to appeal for mercy is, of course, retained.

The High Military Court (a) hears appeals from court-martial sentences (as discussed above), (b) in time of peace acts as a court of both original and final jurisdiction for the trial of general and senior officers, (c) acts as a final appellate board for complaints from disciplinary punishment, and (d) examines the reports of a commanding officer of a fort, military post, or man-of-war who has surrendered to the enemy, and decides whether the surrender was justified.

Composition of Courts. The composition of military courts, when administering justice, is as follows:

a. Permanent courts-martial:
   (1) President—a qualified civilian lawyer appointed by the Queen for life (if possible a former or reserve officer of the Military Juridical Corps).
   (2) Public Prosecutor, with the title of "Auditeur-Militair" —a qualified civilian lawyer.

(3) Members—four regimental officers above the rank of second lieutenant, appointed by the officer commanding the garrison where the permanent seat of the court is located. (Future changes in the law will probably give the appointing power to the Commanding General.)

(4) Secretary—a regimental officer (in practice an officer of the Military Juridical Corps).

b. Field courts-martial:

(1) President—a regimental officer, preferably a qualified lawyer (in practice an officer of the Military Juridical Corps).

(2) Public Prosecutor—an officer (if an officer is not available, then a civilian) who is a qualified lawyer (in practice an officer of the Military Juridical Corps).

(3) Members—two regimental officers (if the president is not a lawyer, it is preferable that one of the members be a lawyer).

(4) Secretary—an officer of any rank (in practice an officer of the Military Juridical Corps).

c. High Miltary Court:

(1) President—a civilian who is a qualified lawyer and a member of the civilian court of appeal in The Hague (the seat of the High Military Court) or of the civilian High Court.

(2) Public Prosecutor with the title of "Advocaat Fiskaal"—the acting prosecuting counsel of the civilian court of appeal in The Hague.

(3) Members—one civilian who is a member of a civilian court, and four regular officers (two of the Army, one of the Navy, and one of the Air Force), usually of the rank of colonel or general.

(4) Secretary—the secretary of the civilian court of appeal. (Usually a senior officer of the Military Juridical Corps acts as Assistant Secretary.)

Defense Counsel. Officers on active duty or qualified lawyers may serve as defense counsel. The accused may choose a defense counsel or ask the president of the court to appoint one. If the accused chooses a lawyer he must pay the lawyer's fee; a lawyer appointed by the president of the court is paid from public funds. Regimental officers who serve as defense counsel receive no extra compensation for their services. Since many practicing lawyers are reserve officers in the Military Juridical Corps, the accused

can easily obtain a defense counsel who is capable of handling both the military and the legal aspects of the case.

IV. CRIMINAL INVESTIGATIONS

When a civil offense is committed by a member of the armed forces, normally an official report is made by a policeman (civil or military) and sent to the offender's commanding officer. When a military offense occurs, it is often a superior of the accused who reports the matter to the accused's commanding officer. Any superior is under a duty to report any criminal act committed by a subordinate. If it is a serious offense, he orders the subordinate into custody as a precautionary measure.

The reports of criminal offenses are examined by the accused's commanding regimental officer, who may, if necessary, appoint an officer or a committee of officers to investigate the case (regimental investigation). If the commanding officer considers the offense to be a purely disciplinary offense, he disposes of the case under the Code of Military Discipline. If the offense is a penal offense, a decision must be made whether to try the acccused. In Dutch civil criminal law the Public Prosecutor decides whether a case will be prosecuted. In military criminal law the determination depends upon the type of court-martial. For a permanent court-martial the decision is made by the Garrison Commander (future changes in the law will probably give this power to the Commanding General), and for a field court-martial the decision rests with the Commanding General. In present Dutch law the term "Commanding General" refers to the authority who has the power to decide whether a case will be referred for trial by court-martial when troops are in the field. The Code of Military Legal Procedure provides that when troops are in the field, commanding officers at division level and above may be appointed Commanding General by authority of the Queen. These officers are then the highest authorities in penal matters and have final responsibility for maintaining order within their commands. Before a case is referred for trial, the advice of the Public Prosecutor of the appropriate court-martial must be obtained, but the decision whether to refer the case for trial is made by the Commanding General or Garrison Commander.

When a case is referred for trial, the documents pertaining to the case are forwarded to the Prosecutor, who turns them over to the investigation officer of the court (a captain in the Military Juridical Corps). The investigation officer hears the accused and

witnesses and seeks to determine the truth of the charges, thus enabling the court to try the case speedily.

V. PUNISHMENTS

The following punishments may be imposed upon persons convicted of military crimes:

a. Death (executed by shooting);

b. Imprisonment;

c. Military detention (a lighter type of imprisonment);

d. Dismissal;

e. Reduction in rank to soldier (may be imposed on noncommissioned officers and warrant officers only); and

f. Confinement to a class of discipline for three months to two years (may be imposed on soldiers only).

The latter three of the aforementioned punishments may only be imposed as a supplement to one of the other penalties. A fine may be imposed in lieu of imprisonment.

There are no prisons under the control of the armed forces. However, the Department of Justice has set aside a civil prison, with a civilian administration and staff, to be used for the execution of confinement sentences imposed on military personnel. A reserve officer is warden of the prison, and a number of noncommissioned officers are assigned there to conduct the military training of the prisoners. Only sentences of less than six months' confinement are served there, as sentences to confinement in excess of six months usually result in discharge from the service.

There is one military detention camp, where sentences to detention are served. These sentences usually vary from three to eight weeks in length.

If a soldier commits repeated offenses against discipline, the Regimental Commander may punish him by the imposition of confinement in a class of discipline for three months to a year. An accused who is convicted of a penal offense may be sentenced by the court-martial to confinement in a class of discipline for three months to two years if it appears that the accused is lacking in the requisite discipline.

VI. THE MILITARY LEGAL SERVICES

A. *BACKGROUND*

For many years the Netherlands Army experienced a need for officers qualified to perform various legal services. These services

can be divided roughly into two categories—those connected with courts-martial and those as legal adviser to commanding officers of large commands. Prior to World War II there were a number of officers in the reserve who were lawyers. It was expected that in the event of mobilization these officers would perform legal duties. However, they were not organized in a separate corps; their only training in military law had been a short course a few weeks in length; and the military training of many of them had been inadequate. Some of the regular officers had law degrees, but these officers were not utilized in the performance of legal services.

The necessity of providing for adequately-trained legal personnel became evident during the mobilization of 1939. After the war a study was made and in April, 1949, the Military Legal Service, or Military Juridical Corps, was formed as a separate corps of the Army and placed under the command of the Chief of Staff, who in peacetime is the highest authority in the Army. The Corps is headed by the Inspector of the Military Legal Service, in the grade of brigadier general or colonel. Since the Inspector, with his staff, is the legal adviser to the Chief of Staff, the Staff of the Military Juridical Corps is a part of the Special Staff of the Headquarters of the Army. In addition to his position as legal adviser to the Chief of Staff, the Inspector commands the Military Judical Corps and exercises professional supervision over those officers of the Corps who are assigned to the various Army field commands. He is also responsible for certain personnel matters, regarding the preparation of plans for the mobilization of field courts-martial personnel and personnel for the legal sections of the staffs of field commands.

The Military Juridical Corps does not act directly as legal adviser to the War Office, which has its own civilian legal staff. Indirectly, however, the Inspectorate advises the Ministry, since the Army Headquarters, which includes the Inspectorate of the Military Juridical Corps, is part of the Ministry.

B. *PERSONNEL*

The Military Juridical Corps consists of regular officers and officers of the reserve, all of whom are qualified lawyers with law degrees from Dutch universities. Since the amount of legal work to be performed is substantially less during peacetime than in wartime, the number of regular officers is much smaller than the number of officers in the reserve.

The regular officers of the Corps are recruited from the regular officers of other branches—infantry, artillery, and cavalry. Each year about two regimental officers with at least six years active service in any branch are given an opportunity to study law at Leyden University at government expense. While attending the University, these officers are exempt from regimental service. Upon completing their studies and displaying a capacity for military legal work they are transferred from their respective branches to the Military Juridical Corps.

The officers in the reserve of the Military Juridical Corps are recruited from officers who have served a number of years in other branches of the reserve and have law degrees. In civilian life they are generally officials of civilian courts or members of the bar.

C. *ORGANIZATION OF THE MILITARY JURIDICAL CORPS*

The Military Juridical Corps is composed of (a) the staff, (b) legal sections of field commands, and (c) courts-martial personnel.

Staff. The staff consists of the Inspector, his adjutants, five bureaus, and some noncommissioned officers who handle administrative matters. Each bureau is headed by a lieutenant colonel. Section I handles legal problems relating to penal and disciplinary law and various other general laws that affect the armed forces. Section II advises the Chief of Staff in connection with duties as Commanding General. As Commanding General, he decides whether cases will be referred for trial by court-martial when troops are in the field. Although at the present time the Chief of Staff is the only Commanding General in the Army, in time of war division and corps commanders are also appointed Commanding Generals. Officers of this bureau are authorized to act for the Commanding General in determining whether to refer a case for trial. Section III is responsible for all matters regarding the personnel of the Corps, including the legal personnel of the staffs of large field commands. This bureau prepares mobilization plans for the legal personnel of courts-martial. Section IV handles problems on international law, supervises training in military law and discipline at the various military schools and training centers and is responsible for the military legal instruction of the younger officers of the Military Juridical Corps. The Corps does not have a special training center for its officers, since the officers of the reserve of the Corps are recruited from among the officers of the other branches of the Army. Section V prepares regulations and standing orders concerning civil affairs

and military government, pursuant to martial law and the laws relating to requisition of material and billeting of troops.

Field Command Legal Sections. A number of combat-ready field commands (division level and above) have on their staffs military juridical sections which act as legal advisers to the commanders. The organization of these sections varies with the size of the command. These sections advise the commander on all legal matters with which he is concerned. In wartime the most important matters relate to: (1) military penal law (referring of cases to courts-martial, *fiat executio*); (2) military disciplinary law (complaints concerning, and control of, disciplinary punishments); (3) martial law (preparation of regulations to be issued by the commander, maintaining contact with civil authorities concerning measures for the protection of the civil population); (4) international law (questions arising from conventions on the laws and usages of war); and (5) jurisdiction in foreign occupied territory. In peacetime the duties of the legal sections differ from the wartime duties, and, in some of the areas listed above, the functions of the section in peacetime are limited to the preparation of measures and orders for use in wartime. Thus, the large commands must have legal sections in peacetime, but the sections are smaller in size than in wartime.

In addition to the legal sections on the staffs of divisions and higher-level field commands, there are legal sections on the staffs of the territorial commanders. The territorial commanders are responsible for the defense of, and the maintenance of order within, their respective districts. These commanders have extensive powers in time of emergency. It is desirable that they have legal officers at their disposal in peacetime to aid in making preparations and drafting regulations for wartime conditions.

Although these legal sections are under the command of, and responsible to, their respective field commanders, they receive professional direction through technical channels from the Inspector of the Military Legal Service, in order to assure uniformity in the application of the law. In addition, the Inspector, as legal adviser to the Chief of Staff, may exert control over, and give directions to, the legal advisers of subordinate commanders.

Courts-Martial Personnel. Certain courts-martial personnel are members of the Military Juridical Corps.

(1) Permanent courts-martial: In the interest of good administration of justice the president is an official of the Department of Justice who is appointed for life and is therefore independent of the military authorities. The prosecutor is also an official of

this Department. The investigating officer and his secretary are members of the Military Juridical Corps. In the performance of their duties they are responsible to the president and prosecutor; but inasmuch as they are members of the Military Juridical Corps, they also receive guidance from the Inspector of the Corps. Direct influence on the court-martial process by military authorities exists in the power of the Commanding General to decide whether a case will be referred to trial.

(2) Field courts-martial: All personnel of field courts-martial are members of the Military Juridical Corps and are therefore subordinate to the Director of the Corps. They are appointed to these positions by the Commanding General, and, before entering upon their duties, the oath of office is administered to them by the Commanding General. Nevertheless, the court acts with Independence in the trial of cases. Although it is possible for the Commanding General to exercise influence upon the court through his power to appoint and dismiss the personnel of the court, he uses these powers only to assure that qualified persons serve on the court.

The number of personnel that are appointed to a court-martial varies with the size of the command to which it is attached. Thus, a single court-martial may have several prosecutors and investigating officers.

D. *LEGAL SERVICES RENDERED TO MEMBERS OF THE ARMED FORCES*

Although the Military Legal Service was not created for the purpose of giving legal assistance to members of the armed forces on personal legal problems, advice on such matters is furnished by the Legal Service upon request. However, attorney's services in civil lawsuits are not provided.

DANISH MILITARY JURISDICTION*

BY SOREN B. NYHOLM**

I. INTRODUCTION

Throughout the centuries Denmark has had special rules or laws for warriors. The first known of such rules was made by King Harald Blaatand (about 950 A.D.) for his Jomsvikings, and about the year 1018 King Kanute made the Vederlog for his housecarles, a law in force both in England and Denmark.

Since that time special legislation for military persons has always existed. In the course of time the group of people subject to this law has gradually been restricted, and today—in times of peace—it only applies to military personnel, and no longer, as in earlier times, to the whole family of such personnel. Similarly the number of offenses to be tried in a military trial have been considerably limited.

Today the military penalties and the military procedure are mainly based on two codes: the military penal code of 1937, with subsequent changes, the latest being enacted in 1954; and the military judicature act of 1919, with subsequent changes, the latest being enacted in 1957.

None of these codes are extensive compared to the civil codes, but they are regarded as an appendix to the civil penal code and the civil code of administration of justice, governing the special military areas which are not covered by the civil codes.

II. THE LEGAL SYSTEM

In civil life, when an offense has been committed the police take action and investigate the case. A charge is brought by the Public Prosecution which, in the event the offense will be tried by a Lower Court, means the Chief of Police. In cases to be tried by the Court of Appeals, the Public Prosecutor brings the charges,

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and in cases to be tried before the Supreme Court, the Advocate General brings the charges.

In military criminal cases these rules will not be followed, although a similar procedure will be used. An attempt will now be made to establish the province of the criminal penal code. As a general rule only military persons, prisoners-of-war, and alien military persons interned in Denmark during a war with other nations can be punished in a military criminal case. Moreover, a distinction must be made as to whether the case represents a violation of the military or the civil law.

A. *VIOLATION OF THE CIVIL LAW*

The view of the code is that a certain connection must be established between the violation as such and the offender's military life or status.

The violation must have been committed on military ground or areas equal thereto, or, in the course of service or in connection with the service, or, if committed against a member of the armed forces or a prisoner of war, it must constitute an offense against another person or against personal honour.

B. *VIOLATION OF THE MILITARY PENAL CODE*

Any violation of the military penal code committed by any of the above named persons will be treated as a military criminal case. Besides this certain other groups of persons are punishable in accordance with the military penal code.

The code will apply to demobilized military persons insofar as their military duties, such as the duty to obey an order of redrafting, are concerned. Further, the first 24 hours after demobilization, demobilized persons are subject to the rules of the military code concerning insubordination, and violence towards a superior.

In times of war a great many other persons will be subject to the military penal code. These include anyone in the service of the armed services, anyone staying at a miltary unit, and anyone who commits grave offenses such as espionage or treason.

C. *THE RULES OF COLLISION*

In the previous section it was assumed that the offense was either a civil or a military violation of the code, but cases are often encountered that cannot be characterized clearly as either a military case or a civil case.

Where one person has committed several violations, some of which are subject to military and others to civil jurisdiction, the whole case will be treated as a military criminal case, although it may be treated as a civil criminal case, if the military and the civil prosecutor agree.

If two or more persons are charged with a violation jointly committed, there may be both a military and a civil case, although it is possible, by agreement, to join the cases together as either a military or a civil case.

D. *THE RULES OF PROCEDURE USED IN MILITARY CRIMINAL CASES*

The military legal system is divided into two parts: (a) *Rettergangschefer*, officers who have the capacity of military prosecution, usually the commanding officers of a regiment, the commander of a ship or a higher ranking officer, and (b) *Auditorer*, judge advocates or military prosecutors, who belong to a special military corps, but who, in times of peace, have no military rank.

The chief of the corps is the general-auditor (judge advocate general). Under him rank the auditorer (one of whom is the assistant judge advocate general) and their assistants, who are trained as detectives.

The generalauditor and the auditors are law graduates, and, before entering the auditorcorps, they have usually served for several years in civil prosecutions or in the civil courts.

The generalauditor is subordinated only to the Minister of Defence, and serves as that official's legal adviser. Furthermore, he is responsible for the supervision of military justice in general. The auditors are connected to the various *rettergangschefer* and are their legal advisers.

The investigation of a civil case is normally made by the police. In military cases it is the military authorities who start the investigation, but if the case is of a more complicated nature, the investigation will be made by the auditor. The civil police have no competence in these cases, but on request, they are obligated to help the auditor with all the means at their disposal.

In military cases the *rettergangschef* will order the charge and the auditor will make the indictment and act as prosecutor for the Lower Court and the Court of Appeal. In cases before the Supreme Court the generalauditor will perform these functions. Herein lies the main difference between civil and military justice.

The Minister of Justice is the highest authority for civil prosecutions and the Minister of Defence for military prosecutions. The latter has the right to order a charge against any person under his authority, but he has no right to order the withdrawal of a charge ordered by a *rettergangschef*.

Normally a case will be tried by the Lower Court or the Court of Appeal, but in special cases the Minister of Defence may grant permission to try the case before the Supreme Court.

Therefore, contrary to the military law of most other nations, military criminal cases in Denmark are normally tried by the civil courts of justice, *i.e.*, the courts that try the cases of civil law.

Normally, the defense of an accused is undertaken by a lawyer just as in a civil case and in accordance with the same rules, but an accused against whom a military charge is brought may choose another military person as counsel for the defense, and, if this person agrees to appear before the court, he will take the same position as a lawyer. This may be useful in cases where special military knowledge is required.

In special cases, *e.g.*, if a vessel is on a cruise or if Danish armed forces are stationed in a country abroad, such as Greenland, where there is no opportunity to go to the normal courts, the criminal penal code authorizes the establishment of a special court-martial. These courts-martial may either be an investigatory-type court or a court of justice, and the chairman is an auditor or one of the senior officers present. In addition to this officer there are two other members in an investigation-court and four others in a court of justice. In the former case one, and in the latter case two, of the members must have the same rank as the person charged and the others a higher rank.

When the ship or the troops return to Denmark the person sentenced by such a court is entitled to appeal to the usual court of appeal, but with the exception of a death sentence, the sentence is executed in spite of an appeal.

III. DISCIPLINARY AND ARBITRARY SETTLEMENTS

If a private wants to lodge a complaint against any superior he applies to the commanding officer of the battalion or an equivalent military commander. If the commander's decision does not satisfy the plaintiff, he may apply directly to a special permanent commission appointed by the Minister of Defence. Members of this commission are a judge (a civilian), an auditor and an officer. The commission reviews the case and submits a proposal to the Minister for his decision.

Military criminal cases may result in punishments other than those imposed by a regular sentence of a court. These punishments depend on the gravity of the violations and the specific military circumstances.

The following punishments are possible: (1) disciplinary castigations, and (2) penalties, in the form of either arbitrary punishments or regular sentences.

A. *DISCIPLINARY CASTIGATIONS*

A disciplinary castigation is not a penalty but is used in lieu of a penalty in the case of minor offenses. They include: (1) a verbal admonition given in a non-abusive manner; (2) work or training in off-duty hours in order to promote the education of the person who has shown negligence or lack of interest in the subject in question; (3) inspection (the person in question is to present himself at a fixed hour); (4) extra duty or other forms of service out of order; and (5) restriction of liberty. Admonition may be given by any superior. Competence to impose the other castigations is delegated to the commanding officer of a company and his superior. Imposition of these castigations is entered in a special book.

Since a castigation is not considered a penalty, it is not possible to bring the case before a court. In case the offender is of opinion that the castigation has been imposed without justice, he may lodge a complaint, but this will not delay the execution of the castigation. In the criminal penal code it is provided that the plaintiff will be punished if the complaint is deliberately untrue.

B. *PENALTIES*

If an offense is of such a nature that it cannot be settled by a disciplinary castigation, a regular penalty must be applied. In this situation there are two ways to handle the case. The case may be brought before the court as discussed previously, or arbitrary castigation may be imposed.

Arbitrary castigation is a penalty imposed by the military authorities without the participation of any court and generally without assistance of an auditor.

It may not seem desirable for the military authorities to act simultaneously as both prosecutor and judge, though subject to strict supervision and control (by the Generalauditor). However, this is not a major point. The reasons for using this form of punishment are partly that military discipline often demands im-

mediate reaction, partly that the enormous amount of minor cases would give the courts far too much work, partly that most of the cases are very similar and less difficult to decide, and, partly that such a settlement works in favour of the offender because the punishment will not be published outside military circles and he will not risk being ordered to pay costs.

Not every commissioned officer has the competence to impose these punishments. Normally the commander of a company is the lowest graded person authorized in that respect. He may impose confinement to barracks for not less than 2 days and not more than 8 days. The competence to punish is gradually increased according to the rank of command of the military chiefs. Greatest is the competence of the *rettergangschef*, who may impose all forms of punishments not exceeding 60 days' arrest, which shall be recognized as equivalent to 40 days' imprisonment. If the punishment is likely to result in imprisonment for more than 30 days, an auditor has to be consulted as legal advisor.

Before punishing a person in accordance with the rules mentioned, it is imperative that a report be drawn up, and, prior to imposing the penalty, the offender must be clearly advised of his legal status. He can accept the penalty, and the execution will follow immediately, or, if the penalty has not been imposed by the *rettergangschef* himself, he may avail himself of the right to ask for the *rettergangschef's* decision in the case. Further he has the right to bring the case before a court within 48 hours. This latter way is only open to him in times of peace, and provided he is serving in the Kingdom of Denmark. Consequently, he does not have the same right during a war or if he is serving aboard a ship or in Greenland.

Every penalty is to be noted in a special book, a copy of which is intended for review first by the superior military authorities and then by the Generalauditor.

IV. THE MILITARY CRIMINAL CODE

The first part of the military criminal code, among other things, contains provisions describing the penalties for violations of the code. These penalties are as follows:

(1) Reproofs, which are to be inscribed in the order of the day or announced to the military unit.

(2) The penalty of confinement to barracks (*kvarterarrest*), not less than 2 and not more than 60 days. The confined person serves as usual, provided he is a private, but for the remainder of

the time has to stay in a room specially selected for this purpose. In the event that he is discharged before the penalty has been fully served, the remainder of the penalty shall cease to have effect. Military persons other than private soldiers do not serve during the confinement, but are wholly confined to their quarters.

(3) The penalty of arrest (*Vagtarrest*), not less than 2 and not more than 60 days. The prisoner serving the penalty is kept in solitary confinement in a cell. He is not entitled to work or to have other occupation, but he may be ordered to work.

(4) The penalty of imprisonment (*Faengsel*) is imposed and served in a regular jail according to the rules of the civil criminal code.

(5) Capital punishment can only be imposed in times of war and is executed by shooting. Should the sentence not be executed before the war is over, the sentence is changed to imprisonment for life.

(6) The penalty of simple detention (*Haefte*).

(7) Fines, which are not normally dictated as a penalty for offenses dealt with by the military criminal code, if at the time of committing the punishable act the offender was on duty in a military capacity. A fine may be imposed, however, in certain cases, *viz.*, if a suspended sentence was in question and the remaining period of service does not leave time enough for a reasonable probation period. Furthermore, they may be applied to offenses committed by a military person who has been demobilized before sentence has been passed on him.

Where preferable, in cases against military persons, civil punishments may be adapted for use as military penalties. Certain penalties have equivalents, *e.g.*, 3 days' confinement to barracks is recognized as an equivalent to 1 day's arrest; 3 days' arrest is recognized as an equivalent to 2 days' imprisonment, and arrest and simple detention are recognized as an equivalent to each other.

The second part of the code contains a description of the special offenses and crimes, which are entirely unknown in the civil criminal code.

The first chapter proscribes crimes against military efficiency, among which there are crimes such as espionage, treason, cowardice, unordered retreat, propaganda, prohibited correspondence, disclosure of military secrets, etc.

The next chapter contains the rules of desertion and absence from the service, the latter applying if the escaped soldier does not intend to desert. Attempts to evade military service through

multilation or simulation are punished in the same way, depending on the intention of the person. In case of desertion or absence the soldier may have his service prolonged for an equivalent period.

The following chapter deals with the duties of the subordinated military person. The offenses of disobedience, disrespect towards a superior or a sentry, and insubordination are covered here. The civil criminal code punishes such offenses as insults and crimes of violence towards a superior or a sentry, but, when committed while in military service, the penalty may be increased up to twice the prescribed maximum.

Of course, mutiny is punished, with extraordinary severity, not less than 4 months' imprisonment. The offense of encouraging mutiny will be punished in the same way. However, mutiny demands the participation of at least two persons and is described as disobedience, insults or violence against a superior or a sentry.

The next chapter enumerates the corresponding duties incumbent upon superiors, namely care in preventing subordinate military personnel from committing crimes or offenses and abstention from insults or violence towards their subordinates, or irregular treatment.

Another chapter makes it a punishable offense to appropriate things from dead and wounded persons or to do the latter harm. Also, violations of various principles of international law and provisions of international conventions which have been ratified by Denmark are punishable.

In the last chapter a series of military duties are described. Initially, it is provided that any violation of military duties, whether they be set out in a regulation, the order of the day, a copy thereof, or is in accordance with prevailing conditions, shall be punished. An offense against this article will be punished more severely if the offender is a commissioned officer.

Of great practical importance are the rules that severely punish a number of offenses committed during guard-duty, especially in times of war. Moreover, negligent care of military equipment is a punishable offense. This, of course, also involves pecuniary liability. Furthermore, in accordance with this chapter, intoxication and public disorder are punishable. Also to be mentioned is the fact that a military person does not have the same right to participate in political meetings and processions as does a civilian. However, these provisions are based on the Danish Constitution. In the same manner the spreading of dangerous discontent in the armed forces is liable to punishment.

Finally it should be mentioned that, according to the principles of the civil penal code, with a few exceptions, the military penal code also provides that acts committed as a result of negligence on the part of the perpetrator shall not be punished except when expressly provided. The cases in which negligent acts become punishable are: violations of military duties, destruction or loss or equipment, and neglect of duty in times of war and committed under circumstances which constitute an aid to the enemy.

SWEDISH MILITARY JURISDICTION*

BY BENGT LINDEBLAD**

I. INTRODUCTION

Since ancient times, there has existed in Sweden a special penal code applicable to the armed forces. This legislation is believed to have originated from court pronouncements and rules during the years when the king and other nobles had jurisdiction over their subordinates. The first real court-martial organization in Sweden was established by Gustaf II Adolf in 1621. Common military laws for the whole force were promulgated for the first time in 1795, and a modern military jurisdiction for the forces was created by a law passed in 1914.

Since January 1, 1949, there has existed no special penal code for the Swedish armed forces and they are subject to the General Code of Criminal Law. When the special penal law of 1914 for the armed forces was abrogated through the new legislation, two chapters with special application to the armed forces were added to the General Code of Criminal Law, *i.e.*, Chapter 26, dealing, with criminal acts committed by members of the armed forces, and Chapter 27 containing special provisions relating to war, state of emergency, etc. At the same time, separate laws were added, providing disciplinary action against members of the armed forces and capital punishment in certain cases when the nation is at war.

II. PENALTIES IN GENERAL

All degrees of criminality, from trifling offenses up to serious crimes punishable by imprisonment, are governed by the General Code of Criminal Law with the two added chapters dealing with violations peculiar to military conditions. Serious crimes may entail imprisonment up to ten years or for life. Capital punishment, which was abolished in Sweden in 1921, shall not apply

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except when the country is at war. Offenders who are between 18 and 21 years of age may be confined to a reformatory, a measure designed to give the convicts a vocational training. In serious cases of recidivism, prisoners will be detained in protective custody for an indefinite period of time. Finally, if the term of imprisonment does not exceed twelve months, the offender may be placed on probation under supervision and given assistance if necessary. This applies primarily to first offenders and is a rehabilitation scheme of very great practical importance.

In the case of juveniles the punishment may be remitted, with or without supervision. However, conditional probation may not be ordered in case of criminal acts committed by members of the armed forces, unless it can be done without danger to the military order and discipline. If the accused is in a responsible position as an officer or non-commissioned officer, down to and including sergeant, he may be dismissed or suspended from his post for a certain period of time. Minor offenders may be sentenced to penalties, normally from one to one hundred and twenty day fines, according to the seriousness of the offense. The amount of the fine is fixed in accordance with the offender's financial position.

III. SPECIAL MILITARY PENALTIES

The above mentioned general penalties apply to all members of the community. For the armed forces there are, additionally, special disciplinary penalties, *viz.*, arrest and disciplinary fines.

A. *ARREST*

Arrest may be imposed for not less than three and not more than thirty days. It is thus a short-term confinement which is served in a military prison. If the offender is sentenced to more than ten days' imprisonment, he shall participate in the duties of service during the period in excess of ten days. During the period of the sentence the offender may also be subject to the curtailment of pay by a certain amount to be fixed in proportion to his salary.

B. *DISCIPLINARY FINE*

The disciplinary fine, which is imposed for minor offenses, is a monetary penalty which is carried into effect by salary deductions during a certain number of days, from one to twenty, at so much per day in accordance with the size of the offender's pay, exactly as in the case of arrest.

These disciplinary penalties just mentioned rank with fines imposed as general penalties. In the interests of military discipline,

however, disciplinary penalties shall normally be imposed, and only in case the offender is sentenced after having finished his military service may fines in the nature of general penalties be imposed.

C. *REPRIMANDS AND OTHER PENALTIES*

Finally, reprimands may be resorted to. These, however, are not a penalty in the actual sense of the word, but a means of correction placed at the disposal of the command. A reprimand shall only be used when the offense is of an extremely minor nature. It can be administered in the form of a warning, in writing or by word of mouth, but may not be indicated on official orders or otherwise made public. Furthermore, extra duty may be imposed for a certain period of time, not exceeding seven days, or for a certain number of times, not more than four, in helping out or performing some other special task in addition to the normal round of duty. Confinement to quarters, *i.e.*, orders to stay within a certain area (barracks, company premises, etc.) when off duty, may be imposed for a certain period of time, not exceeding seven days. Personnel serving on board ship may be denied shore-leave, *i.e.*, they may be prohibited from leaving the ship during a certain period, not exceeding seven days, or for a certain number of days, but not more than four.

IV. MILITARY LEGAL PROCEDURE

Military legal procedure is also new since January 1, 1949. Previously, regiments and other units had their own military courts, presided over by a military judge, with officers of different ranks as assistants and a military attorney as prosecutor. When the special penal code for the armed forces was abrogated the special courts were abolished as well, and military jurisdiction was transferred to civilian law-courts, as a rule the court (city court or district court) situated in the garrison town.

The military cases brought before civilian courts are, generally speaking, handled in accordance with the same rules of procedure as other cases. In a court of first instance the president is a judge appointed by the Government, assisted by a number of laymen, who are appointed by the municipality for a period of six years. These assistants participate in the procedure not only by weighing the evidence to determine guilt but also by consulting with the judge in order to determine the sentence. There are nine assistants in cases of serious offenses and three in other cases. The assistants may overrule the judge and determine the sentence if seven of them, in the former case, and all three, in the latter, so agree.

The Public Prosecutor summons the accused to appear in accordance with normal procedure. In certain cases of importance the accused is entitled to public counsel, and the procedure, which is verbal and limited to a general hearing, is conducted in accordance with the same rules as apply to civil cases. A representative of the military unit is usually present to follow the proceedings and furnish information in his capacity as military expert. Recourse may be had, in the normal way, to the Court of Appeal and the Supreme Court.

In minor cases the chief of a regiment or similar unit has a right to impose disciplinary penalties—arrest not to exceed fifteen days and disciplinary fines. He has at his disposal a military legal adviser, who is, as a rule, a local civilian judge or barrister who functions as an assistant in addition to his ordinary duties. This jurisdiction comprises only minor offenses of illegal appropriation of material belonging to the armed forces and, in particular, military offenses such as insubordination, absenteeism, desertion, abandonment of post, alcoholism, drinking while on duty, improper behavior, dereliction of duty, and other offenses which primarily have to do with military order and discipline and which call for immediate action.

In order that a case may be disposed of in the above mentioned way, it is required that the offender admit his guilt and that there is no other charge against him except that of the Crown. Otherwise, the case shall be referred to the Public Prosecutor who, after the usual preliminary investigation, summons the offender to appear before the court. A sentence passed by the chief of the regiment may be appealed to the civilian court which then functions as a court of appeal. Subsequently, further recourse to higher courts may be had by the prosecutor as well as by the offender.

In a state of war or emergency, a court-martial shall take the place of a civilian court of first instance in cases pertaining to the armed forces. Such a court-martial is presided over by a judge aided by three assistants, two civilians and one military person, with a military attorney as prosecutor. A sentence passed by a court-martial is appealable in the normal way to the Court of Appeal and the Supreme Court.

V. THE PARLIAMENTARY COMMISSIONER FOR MILITARY AFFAIRS

The office of Parliamentary Commissioner for Military Affairs might be of particular interest to foreign observers. This office, which was created in 1915, is modelled on that of the Parliamen-

tary Commissioner for Civil Affairs, which has 150 years' tradition behind it. Both officials are appointed by the Parliament for a tenure of four years. While the Parliamentary Commissioner for Civil Affairs critically scrutinizes the activity of law-courts, prosecutors, and the steadily growing central and local public administration, the Commissioner for Military Affairs has as his domain military administration and jurisdiction.

The Commissioner for Military Affairs is also a civilian official, usually a high-ranking judge. He inspects army units and other military installations, devoting special attention to the administration of justice in these places; the general services; the quality and maintenance of buildings with appurtenances and their suitability to the purpose for which they are intended; living conditions; food supplies; medical facilities; welfare activities; control of equipment and clothing; workshop organization and safety measures; etc.

The Commissioner for Military Affairs also inspects law-courts and prosecutors in order to check the handling of military cases, particularly with a view to speedy settlement of these cases. He makes critical notes on the observations made in the course of these activities. Questions of minor irregularities are generally quietly rectified and improved. In certain cases the Commissioner for Military Affairs will request an explanation from the person responsible. Also, investigations may have to be made in consequence of complaints or representations from private individuals. A member of the armed forces cannot be denied the right to approach the Commissioner for Military Affairs directly in any matter. Occasionally, some irregularity may come to the Commissioner for Military Affairs' notice through the press. If some important accident happens, the Commissioner for Military Affairs will, as a rule, participate in the investigation. Out of 777 cases dealt with in 1961, 101 were based on complaints or representations from private individuals, whereas 634 arose from inspections or inquiries incumbent upon the Commissioner for Military Affairs.

In many cases there is a question of interpretation and adoption of different provisions, and the results of the Commissioner for Military Affairs's investigations are summed up in an authoritative statement for the guidance of the administration. If negligence is involved, this will be pointed up by the Commissioner for Military Affairs in the course of his investigation. In the case of minor offenses where the culprit has acknowledged his guilt and, if required, has made restitution, the Commissioner for Military

Affairs will confine himself to administering an admontion and will take no further action. If the case is of a more serious nature, the Commissioner for Military Affairs may ask the military chief in question to take disciplinary action, provded the offenses committed are punishable in this manner. Otherwise the Commissioner for Military Affairs may authorize the Public Prosecutor to institute and conduct legal proceedings in a civilian court of justice. During 1961 six such cases led to prosecution. Of the cases, one hundred and sixty-five, were dismissed after a hearing or investigation, whereas in two hundred and twenty cases, a task incumbent upon the Commissioner for Military Affairs is to present proposals to the Government for amendments to various laws.

At the beginning of each year the Commissioner for Military Affairs, just like the Commissioner for Civil Affairs, submits for the opening of the Parliament a report of his activities during the past year. The cases that are of general interest are dealt with in detail. These annual reports of the Commissioner for Military Affairs which are published in the form of a book, are of very great importance in guiding the military judicature and administration.

A Parliamentary committee studies the report, and occasionally an action taken by the Commissioner for Military Affairs leads to discussion. Generally speaking, however, the decision of the Commissioner for Military Affairs cannot be appealed.

The public scrutiny of the administration which, on the military side, is exercised through the Commissioner for Military Affairs, has aroused interest outsde of Sweden. In the other Scandinavian countries a similar supervisory authority has been in existence for some time, and in the Federal Republic of Germany such an office, based partly on the Swedish pattern, was established in 1959.

COMMENTS

PROVING FEAR AS A STATE OF MIND IN HOMICIDE CASES.* The purpose of this comment is to discuss the rule of law relating to the admissibility in evidence of statements of homicide victims made within a matter of weeks, months, or even years, prior to their death relative to their fear or lack of affection for the person accused of their murder. General, the rule is that statements of deceased persons not made while in extremis may not be introduced to prove the truth of the matters asserted in the statement without express statutory provision.[1] It is not the purpose of this comment to discuss the general rule, or its statutory exceptions, but it is intended to discuss a recognized case law exception to the general rule relating to the admissibility of statements of a homicide victim made while not in extremis, regarding his fear or lack of affection for the defendant. Included in the comment will be a discussion of a related rule of law pertaining to the admissibility of certain statements of deceased persons in general relating to their intent to do a particular act in the future. As will be noted hereinafter, this rule of law will be discussed primarily with a view towards ascertaining the admissibility of statements of deceased persons relating to their intent to do a future act, where the reason for the commission of the future act is based upon fear of the defendant.

I. THE HILLMON CASE

The Manual for Courts-Martial, United States, 1951 provides a starting point for the discussion. Paragraph 142*d* of the Manual provides in part as follows:

> If a statement made under circumstances not indicative of insincerity discloses a relevant and then existing . . . intent or state of mind . . . of the person who made the statement, evidence of the statement is admissible for the purpose of proving the . . . intent or state of mind . . . so disclosed.[2]

While the Court of Military Appeals has discussed the Manual rule in two cases, and has recognized its application to military law generally,[3] there have been no military cases on the precise

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[1] 5 Wigmore, Evidence § 1576 (3d ed. 1940).

[2] For a similar rule, see Uniform Rule of Evidence 63(12).

[3] United States v. Marymont, 11 USCMA 745, 29 CMR 561 (1960); United States v. Jester, 4 USCMA 660, 16 CMR 234 (1954).

point under discussion. Legal writers and encyclopedists also recognize the general exceptions to the hearsay rule involved, and American case law overwhelmingly sustains the admissibility of statements relating to the state of mind of the declarant when the state of mind is relevant,[4] but there are, however, relatively few cases dealing directly on the admissibility of statements relating to fear.

Prior to entering a discussion of case law pertaining to the admissibility of statements of homicide victims relating to fear of the defendant, it is first necessary to discuss the often cited Supreme Court case of *Mutual Life Insurance Company v. Hillmon*.[5] The reasons for such a discussion are twofold. First, as will be seen, statements of fear may possibly be introduced in evidence under the *Hillmon* doctrine; and secondly, cases sustaining the independent relevancy of statements of fear often cite *Hillmon*.[5] The reasons for such a discussion are twofold. First, not the first American case to recognize the state of mind exception to the hearsay rule, *Hillmon* is the leading authority for the admissibility of statements of intent to do a future act, where the future act itself is relevant.[6] The Supreme Court in *Hillmon* provided:

[4] "Assuming that the state of mind of a person at a particular time is relevant, his declarations made at that time are admissible as proof on that issue, notwithstanding they were not made in the presence of the adverse party. It is clear that when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations are regarded as acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person, or his behavior, or his actions generally. The truth of the statement is immaterial when offered to prove a state of mind." 20 Am. Jur. *Evidence* § 585 (1939). See also 20 Am. Jur. *Evidence* § 587 (1939); 26 Am. Jur. *Homicide* § 379 (1940); 31 C.J.S. *Evidence* § 225 (1942); 6 Wigmore, *Evidence* §§ 1714, 1725, 1730, 1772 (3d ed. 1940); Comment, *Evidence: State of Mind and Physical Condition as a Hearsay Exception*, 14 Okla. L. Rev. 75 (1961); Hinton, *States of Mind and the Hearsay Rule*, 1 U. Chi. L. Rev. 394 (1934); Hutchins and Slesinger, *Some Observations on the Law of Evidence: State of Mind in Issue*, 29 Colum. L. Rev. 147 (1929); Seligman, *An Exception to the Hearsay Rule*, 26 Harv. L. Rev. 146 (1912); and cases cited in the foregoing authorities. There are a limited number of contrary cases, generally dated prior to 1900. Grounds for exclusion usually are because the declarations were made in the absence of the accused, or because the declarations were not part of the res getae. See Annot., 113 A.L. R. 264, 295 (1938), for an annotation of contrary cases and theories of exclusion. As the annotation indicates, these cases are contrary to the general rule of admissibility.

[5] 145 U.S. 285 (1892).

[6] Payne, *Hillmon Case—An Old Problem Revisited*, 41 Va. L. Rev. 1011 (1955); Morgan, *Statements Evidencing Mental Condition*, 3 Ark. L. Rev. 182 (1949); Hinton, *States of Mind and the Hearsay Rule*, 1 U. Chi. L. Rev. 394 (1934); Hutchins and Slesinger, *Some Observations on the Law of Evidence:*

A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declaration of the party.

The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. Afer his death, there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.

. . . .

"Such declarations are regarded as verbal acts, and are as competent as any other testimony when relevant to the issue. Their truth or falsity is an inquiry for the jury."[7]

Since 1892 *Hillmon* has been cited more often than any other case on this point of law, yet it is probably one of the most controversial cases in the law of evidence. However, it is undeniably the leading authority in its area, both in civil and criminal cases.[8] This is partially accounted for by the fact that the Supreme Court in *Hillmon*, while concerned with a civil matter, was quite definite in pointing out that the same rule applied equally in bankruptcy actions, tort actions, probate matters, and murder cases.

Hillmon weathered forty-one years before, in 1933, the Supreme Court made its first and last assault on its then well known exception to the hearsay rule. In *Shepard v. United States*,[9] the Supreme Court condemned the introduction into evidence of the statement of Mrs. Shepard that "Doctor Shepard poisoned me." At the time of the statement Mrs. Shepard was dying of poison, but was not, unfortunately, at death's door when she made the statement. At the time of the utterance Mrs. Shepard did not believe she was going to die. The statement was, however, introduced in Shepard's trial for the murder of his wife as a dying declaration on her

State of Mind to Prove an Act, 38 Yale L. J. 283 (1929); Maguire, *The Hillmon Case, Thirty-Three Years After*, 38 Harv. L. Rev. 709 (1925).

[7] 145 U.S. at 295–96.

[8] See note 6 *supra*.

[9] 290 U.S. 96 (1933).

part. On appeal the Government attempted to sustain admissibility on the theory that the statement indicated an anti-suicide frame of mind on the part of Mrs. Shepard, as the defense had defended on the basis that the wife committed suicide. Justice Cardozo, while recognizing the *Hillmon* rule, attempted to limit its further expansion as follows:

> [The Government] did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband.
>
> . . . .
>
> There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent.
>
> . . . .
>
> The ruling in [*Hillmon*] . . . marks the high water line beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary. Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.
>
> The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and more than that, to an act by someone not the speaker.[10]

It is apparent that the drafters of the Manual for Courts-Martial borrowed from *Shepard's* factual situation in placing the present restriction appearing in paragraph 142*d* of the Manual, prohibiting the admissibility of statements showing the state of mind of the declarant if such statements amount to an accusation that the accused committed the crime charged ("I'm afraid A is putting poison in my food, etc."). Additionally, *Shepard* accounts for the rule that declarations of intention must cast light upon the future and not upon the past. They must face forward and not backward.[11] Aside from this limited mileage, Mr. Justice Cardozo's views in *Shepard* have not been to well accepted by American legal writers or case law.[12]

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[10] *Id.* at 104–6.

[11] United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961).

[12] See, *e.g.*, McCormick, Evidence 904, n. 46 (2d ed. 1948), wherein Professor McCormick comments upon Mr. Justice Cardozo's attempt to block further extension of the *Hillmon* doctrine as follows: "The grist of decision shows constantly the urge to resort to evidence of declarations of persons deceased about previous happenings, where the needs of justice seem to require it . . . ." Professor Payne, writing in the Virginia Law Review in 1955, see note 6

II. THE ENLARGEMENT OF HILLMON

Hillmon, however, has not only forged ahead, but has been enlarged. Recent cases commenting upon the state of mind exception to the hearsay rule substantiate the foregoing conclusion. In 1948, in *Wibye v. United States*,[13] the Federal District Court for the Northern District of California, in an action under the Federal Tort Claims' Act, cited *Hillmon* as authority for the admission of the decedent's mother's testimony that her son told her where he was going and why he was going that particular route immediately before departing on a journey that resulted in his death in an automobile accident. The District Court, in effect, thus sanctioned an enlargement of the *Hillmon* doctrine to include not only a statement as to a future act, but to include, additionally, a statement as to the *reasons* that prompted the future act.

In 1949, the Supreme Court of Alabama in *Thornton v. State*,[14] a premeditated murder case, recognized *Hillmon* in approving testimony given by the victim's wife concerning his statements to her as to where he was going and why (to collect a $1000 debt) immediately before going to the defendant's house where he met his death. Also in 1949 the United States Court of Appeals for the Second Circuit, in an action for libel consisting of a newspaper statement that the plaintiff had been in a mental institution as a patient, cited *Hillmon* as "still authoritative" in approving the admissibility of testimony of witnesses who told of third persons stating their thoughts on the matter, or asking about the plaintiff's confinement.[15] The Second Circuit further noted that such statements "are not offered as proof that the facts asserted therein are true but as evidence from which the declarant's state of mind might be inferred." The Court distinguished *Shepard* on the grounds that the "declaration (in *Shepard*) was not of the declarant's feelings, intentions or beliefs, and for that reason was declared incompetent."

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supra, in a lengthy examination of Mr. Justice Cardozo's caveat in *Shepard*, notes that case law both before and after *Shepard* failed to follow the limitation suggested by the Justice. Futhermore, according to Payne, the doctrine should be further extended, within the discretion of trial judges, to cover statements of past recollection or memory as opposed merely to statements reflecting the then existing state of mind of the declarant. For a contrary position, see MCM, 1951, para. 142*d*, and Uniform Rule of Evidence 63(12), which limit the inquiry to statements disclosing a relevant and "then existing" state of mind. *But see* People v. Chevrolet Convertible Coupe, 45 Cal. 2d 613, 290 P.2d 538 (1955), for a case supporting Payne's recommended extension of the *Hillmon* doctrine.

[13] 87 F. Supp. 830 (N.D. Cal. 1948).

[14] 253 Ala. 444, 45 So.2d 298 (1949).

[15] Mattox v. News Syndicate, 176 F.2d 657 (2d Cir. 1949).

In 1956 the Ninth Circuit, in a criminal case, recognized "the much cited case of *Mutual Life Insurance Company v. Hillmon*" as authority for the rule that "proof of intent may be made through declarations and expressions which tend to show present intent, as an exception to the hearsay rule."[16] The *Hillmon* rule was also cited and approved by the United States Circuit Court of Appeals for the District of Columbia[17] and the Supreme Court of Tennessee,[18] in 1956, and by the United States District Court for the Northern District of Iowa,[19] and by the United States Court of Appeals for the Second Circuit[20] in 1961. In the last case mentioned, *United States v. Annunziato*,[21] a criminal case, the Second Circuit explained in detail the necessity for enlarging the *Hillmon* rule to sustain admissibility not only of a statement by the deceased as to a future act planned by the deceased, but also of "an altogether natural explanation of the reason, in the very recent past, that prompted it." The court pointed out that *Shepard* "does not hold that a declaration of design is rendered inadmissible because it embodies a statement why the design was conceived." *Shepard* was further distinguished as a case where the testimony "faced backward and not forward."

As the foregoing cases demonstrate, *Hillmon* is very much alive. The present posture of the rule, as revealed above, is (1) recent statements of a deceased person indicating an intent to do an act in the future, provided the contemplated act is in itself relevant, are admissible in evidence, not necessarily to prove the truth of the matters asserted, but to prove the intent to do the act contemplated; and (2) statements indicating the reason for or purpose of the contemplated act are likewise admissible. Accordingly, it would appear probable that under the enlarged *Hillmon* rule, or more appropriately the *Hillmon-Annunziato* rule, the statement of a homicide victim, for example a deceased wife, that she intended to divorce her husband because he had recently threatened to kill her (or because she had lost all affection for him, etc.) should be admitted in evidence in military courts as well as civilian courts in the trial of the husband for the murder of his wife, provided the wife's statement was made within a reasonable period of time before her death, and was not made under suspicious circumstances.

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[16] Bryson v. United States, 283 F.2d 657 (9th Cir. 1956).
[17] Watkins v. United States, 233 F.2d 681 (D.C. Cir. 1956).
[18] Nichols v. State, 200 Tenn. 65, 289 S.W.2d 849 (1956).
[19] Krimlofski v. United States, 190 F. Supp. 734 (N.D. Iowa 1961).
[20] United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961).
[21] *Ibid.*

III. STATEMENTS OF FEAR

While the *Hillmon-Annunziato* doctrine would thus serve as an indirect method for the introduction of statements relating to a homicide victim's fear of or lack of affection for the defendant, related cases, often citing *Hillmon*, or Wigmore's "verbal act doctrine"[22] or related doctrines as authority, substantiate the proposition that statements of a homicide victim made while not in extremis relating to fear of or lack of affection for the defendant are per se relevant and admissible in circumstantial murder cases.

The first case in this regard was *Karnes v. Commonwealth*,[23] decided by the Supreme Court of Virginia in 1919. In this case the Virginia court, citing both *Hillmon* and Wigmore's verbal act doctrine as authority, noted that the statements of a female homicide victim made some two days before the homicide, expressing fear of a third person, the fact that the third person had recently threatened to kill her, that she feared violence from this person, and that she no longer went with him, were admissible in evidence in favor of the defendant charged with her murder. The court noted in dictum that had the third person been charged with her murder the evidence would have likewise been clearly admissible against him. Thus the court extended both the *Hillmon* and verbal act doctrines. In *Karnes* there was no showing of an intent on the part of the victim to commit an act in the future as required by *Hillmon;* nor was there any significant act performed simultaneously with the victim's declarations in order for the principles of Wigmore's verbal act doctrine to apply. On the other hand it appears more probable that the rationale of the decision lies in the following language of the court:

> Much must be left to the discretion of the trial judge, but where the proper determination of a fact depends upon circumstantial evidence, the safe practical rule to follow is that in no case is evidence to be excluded of facts or circumstances connected with the principal transaction, from which an inference can be reasonably drawn as to the truth of a disputed fact. . . . [W]hile a single circumstance, standing alone, may appear to be entirely immaterial and irrelevant, it frequently happens that the combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion.[24]

It was a good number of years before a similar decision was forthcoming. In 1946 the Supreme Court of Washington sustained

[22] 6 Wigmore, Evidence § 1772 (3d ed. 1940): "A second kind of situation in which utterances are not offered testimonially arises when the utterances accompany conduct [an act] to which it is desired to attach some legal effect."

[23] 125 Va. 758, 99 S.E. 562 (1919).

[24] *Id.* at 764, 99 S.E. at 564.

the very point advanced in *Karnes*, but did so without citing either *Karnes, Hillmon*, or Wigmore's verbal act doctrine, but based its holding on a doctrine similar to the latter stated in Wharton's *Criminal Evidence*.[25] In *State v. Bauers*,[26] the accused was charged with first degree murder of his wife and convicted of second degree murder. Upon trial it appeared that the accused's wife died as the result of a wound inflicted upon her by a bullet discharged from a rifle in the hands of the accused. The charge was predicated upon the theory that the accused discharged the rifle with premeditated design to kill. The accused claimed that the rifle was accidentally discharged while he was examining it and showing its mechanims to his sister. During the trial the wife's mother testified for the prosecution, over defense objection, that her daughter had told her on several different occasions during the month preceding her death that she was in deadly fear of her husband. The court held that, "under a well recognized exception to the hearsay rule" the victim's "state of mind could [be] shown by evidence of statements of [the victim] indicating her attitude . . ." and that the mother could testify "concerning declarations on the part of the daughter to the effect that she was in fear of the appellant."

The Supreme Court of Pennsylvania in 1947[27] and 1948[28] sanctioned the introduction of statements of homicide victims, made while not in extremis, that their husbands had beaten them. In both cases the court cited prior Pennsylvania cases to the effect that evidence of ill will between the parties in homicide cases was admissible, together with similar sections from *Corpus Juris*. Wigmore's verbal act doctrine, however, was also cited as authority in the latter case.

In *Lowrey v. State*,[29] the Supreme Court of Oklahoma, without citing *Hillmon* or *Karnes*, approved the testimony of the murder victim's father to the effect that the victim had told him sometime before her death that she was afraid of the defendant and wanted

[25] 1 Wharton's Criminal Evidence § 285, at p. 365 (11th ed. 1935): "Declarations of deceased, about the time of the homicide and so connected with it as to form a part of the transaction or to explain it, are relevant on the prosecution of the homicide charged . . . . Where deceased declared that she was going to see the accused and inform him of her condition, and tell him that he must do something for her, the declaration made while in the act of going is competent to characterize the act, and when the declaration and act unite, the whole becomes a fact in the case."

[26] 25 Wash.2d 825, 172 P.2d 279 (1946).

[27] Commonwealth v. Barnak, 357 Pa. 391, 54 A.2d 37 (1947).

[28] Commonwealth v. Peyton, 360 Pa. 441, 62 A.2d 37 (1948).

[29] Lowrey v. State, 87 Okla. Crim. 313, 197 P.2d 637 (1948).

a transfer of employment in order to get away from him. The court cited prior Oklahoma cases and Wigmore's text on evidence.[30]

In 1949 the Supreme Court of Washington reaffirmed the admissibility of a statement of a homicide victim that he was afraid of the defendant,[31] citing *State v. Bauers*[32] as authority.

In *Guthrie v. United States*,[33] a United States District Court held a declaration of a homicide victim, overheard as coming from the defendant's room, and indicating that something unpleasant was being done to the declarant, was admissible "under an established exception to the hearsay rule which admits statements of a person's own mental or physical condition." The District Court cited as authority those sections of Wigmore[34] which provide generally for the admission of state of mind evidence relating to the emotions of fear, malice, and affection.

In 1955, in *State v. Shepard*,[35] the Supreme Court of Ohio, in the trial of Doctor Shepard for the murder of his wife, affirmed the introduction of testimony by a prosecution witness that Mrs. Shepard, the victim, told the witness shortly before her death that her husband had told her that he had discussed the possibility getting a divorce from her while he was in California. The court proceeded to point out that in wife murder cases, the state of affection between the husband and wife was most material and quoted Wigmore as authority for its holding in this regard.[36]

The rule has been enlarged by California cases within the past three years. Prior to the California cases, case law affirming the admissibility of statements of homicide victims made while not in extremis indicating fear of or lack of affection for the defendant involved statements made within a short period of time before the death of the victim concerned, and were statements of a very general nature, to wit, simply that the victim was afraid of the defendant or had been beaten by him, etc. In *People v. Merkouris*,[37] the Supreme Court of California, in a first degree murder trial,

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[30] 1 Wigmore, Evidence § 102 (3d ed. 1940), a section directly related to 6 Wigmore, *supra*, § 1725, wherein Wigmore provides for the admissibility of state of mind evidence relating to future plan or design, a section that is almost identical to the *Hillmon* doctrine.

[31] State v. Boggs, 33 Wash.2d 921, 207 P.2d 743 (1949).

[32] Note 26 *supra*.

[33] 207 F.2d 19 (D.C. Cir. 1953).

[34] 6 Wigmore, Evidence §§ 1714, 1730 (3d ed. 1940).

[35] 100 Ohio App. 401, 128 N.E.2d 471 (1955).

[36] 6 Wigmore, Evidence § 1730 (3d ed. 1940).

[37] 52 Cal.2d 672, 344 P.2d 1 (1959). See also People v. Atchley, 53 Cal.2d 160, 346 P.2d 764 (1959).

citing *Karnes*,[38] *Bauers*,[39] and *Lowrey*,[40] as authority, permitted the prosecution to prove statements of fear of the defendant made by the two murder victims concerned some *six years* before their murder. In this case the statements of the victims were essentially that the defendant had threatened their lives and that they were going to get a permit to carry a gun because of this fact. In 1960 in *People v. Feasby*,[41] a District Court of Appeals of California, in a first degree murder trial, approved the introduction of a statement of the victim made one year prior to her death to the effect that she liked the defendant but didn't love him because he wanted her to commit oral relations "all the time"; that the defendant had "roughed" her up; that she was "very, very afraid" of the defendant, and that he had threatened to shoot her. The court ruled that the questioned statements were properly admitted in evidence, not to prove the truth of the matters asserted therein, but to show "the state of mind of the deceased." In *People v. Purvis*,[42] the last of the California cases, the Supreme Court of California, in 1961, reversed a murder conviction where the statements of the murder victim were admitted in evidence to the effect that the defendant had deliberately held the victim's head under water, and had burned her thighs and vaginal track with lighted cigarettes. The court noted that these statements were highly prejudicial in nature, were improperly argued to the jury in closing argument by the prosecution as evidence of the truth of the events described in the statements, as opposed merely to showing the state of mind of the declarant, and were not relevant to any fact in issue (the accused had pleaded guilty to second degree murder). In a concurring and dissenting opinion, Justice Schauer agreed that the scope of the statements went far beyond that necessary to show a state of mind of the victim, but disagreed with the majority on the general relevancy of state of mind evidence on the issue of premeditation.

IV. CONCLUSION

While the foregoing cases relating to the admissibility of statements of fear or affection on the part of homicide victims are predominately state cases, such decisions as already pointed out are based upon the state of mind exception to the hearsay rule, an exception long recognized in both federal and state decisions.[43]

[38] Note 23 *supra*.
[39] Note 26 *supra*.
[40] Note 29 *supra*.
[41] 178 Cal. App.2d 723, 3 Cal. Rptr. (Dist. Ct. App.) 230 (1960).
[42] 13 Cal. Rptr. 801, 362 P.2d 713 (1961).
[43] See note 4 *supra*.

Additionally, it is noted that the cases relating to the admissibility of such statements, with the possible exception of statements of fear indirectly admissible under the *Hillmon-Annunziato* doctrine, are perhaps too few in number to be defined as representing a majority view. But significantly, there are no contrary decisions by any court to the effect that statements of fear or affection on the part of homicide victims are *not* admissible in evidence under the state of mind exception to the hearsay rule. Thus, it would appear inappropriate to term the above discussed cases as representing a minority point of view on this matter. On the other hand, it is more appropriate to view these cases as representing more than a mere fragment of law; they represent a forecast of future law, a law that is evolving with the needs of society. These decisions cover not only situations that have already arisen in our civilian courts, but by analogy situations that are likely to arise time and time again in both civilian and military courts. The cases clearly demonstrate Professor McCormick's observation that American courts, in regard to proving the emotions of fear and affection, have resorted "to evidence of declarations of persons deceased about previous happenings, where the *needs of justice* seem to require it . . . ."[44]

While the extreme boundaries of the present excursion into the hearsay rule have yet to be established, there are several general conclusions or guidelines that may be drawn from the above discussed cases. First, it would appear that the statement of a homicide victim made within a reasonable time before death, and made not while in extremis, indicating a then existing fear or lack of affection for the defendant is a relevant ground of inquiry. The relevancy of the state of mind to be proven, however, should be established, *i. e.*, as circumstantial evidence of the defendants identification or motive, or as circumstantial evidence that the defendant had done some act or said something to the victim to cause him to fear the defendant, or as evidence to rebut a claimed relationship of happiness between the parties, or to rebut a claim of self defense on the part of the defendant. The remoteness of

[44] McCormick, Evidence 904, n. 46 (2d ed. 1948) (emphasis added). Or in other words, "the needs of justice" rather than the theories advanced in *Hillmon*, *Karnes*, or *Shepard*, or Wigmore's verbal act doctrine, etc., appear to be the better and more consistent and logical answer for the case law venture in this regard into the realm of the hearsay rule. While this generalization may well be true, it is advanced that Wigmore's doctrine providing for the admissibility of state of mind evidence relating to the emotions of fear, malice, affection, etc. (6 Wigmore, Evidence §§ 1714 and 1730 (3d ed. 1940)), while as yet infrequently cited by American courts of record on this point, furnishes an equally respected reference for the introduction of such evidence.

the statement involved, though, may within the discretion of the trial judge render the statement inadmissible. Secondly, it would appear that statements of fear, or lack of affection, that involve more detail than that necessary to fairly establish the appropriate state of mind of the victim are objectionable; and lastly, that details of the statement establishing a state of mind are not admissible to prove the truth of the matters asserted, but are admitted only for the limited purpose of showing the state of mind involved.

As pointed out in the beginning of this comment, paragraph 142*d* of the Manual for Courts-Martial provides for the admissibility of state of mind evidence in court-martial proceedings. And as also noted previously, the Court of Military Appeals has recognized the general applicability of the Manual rule to military law in two cases.[45] While courts-martial and Federal courts in general are not bound by state decisions on questions of evidence, state precedent may of course be cited as authority for the introduction of evidence.[46] The general competency of evidence in the final analysis depends upon whether it is likely, all things considered, to advance the search for truth.[47] Both courts-martial and Federal courts have broad discretion in the admission of evidence.[48] Accordingly, in view of the civilian precedent discussed above and in view of the "needs of justice" generally, it is concluded that statements of homicide victims made while not in extremis relating to fear of or lack of affection for the person accused of their homicide should be admissible in court-martial proceedings under the provisions of paragraph 142*d*, Manual for Courts-Martial, subject to the limitations set forth in the preceding paragraph.

LUTHER C. WEST*

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[45] See note 3 *supra*.

[46] *E.g.*, Table of Cases and Opinions Cited, State Court Decisions, Citators and Index, Volumes 1 to 25, Court-Martial Reports, pp. 332–363 (1951–1958).

[47] *E.g.*, United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944); United States v. Boyd, 7 USCMA 380, 22 CMR 170 (1956).

[48] *E.g.*, United States v. Clancy, 276 F.2d 617 (7th Cir. 1960); United States v. Stewart, 1 USCMA 648, 5 CMR 76 (1952).

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THE NATURE OF BRITISH MILITARY LAW.* Anyone reading the British Manual of Military Law must be instantly aware that it is describing a system of law in marked contrast with that which is administered in the civil courts.[1] The reader might also reasonably guess that the system has changed very little since the 18th century. This impression is confirmed by the briefest of historical surveys. In fact, the manual is based on Tytler's essay on Military Law and the Practice of Courts-Martial, published in 1806. Tytler was a judge of the Court of Sessions in Scotland and had formerly been Judge Advocate of North Britain. The issues which he raises are familiar to those particing law in British military courts at the present time, and as a result the book has an extraordinarily modern ring about it. The purpose of this article is to discuss the essential nature of the law administered in British courts-martial, and to investigate to what extent this law is reconcilable with the canons of judicial process now currently accepted by English lawyers.

I. THE CONSTITUTIONAL PROBLEM

It is important in discussing the matter with a non-British audience to refer briefly to the constitutional problem raised by military law and to outline some fundamental principles of the British constitution. It will be remembered that in the 17th century a crisis developed between the Crown and Parliament in which the

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency. The author acknowledges the assistance of Wing Commander D. B. Nichols, Director of Legal Services, Royal Australian Air Force, in the preparation of this comment.

[1] "But the members of the court-martial were no jurists; and when law is quoted and an order of the Horse Guards alleged, in terms acquitting Captain Douglas, in support of a proposition grounded on common sense, the law and the proposition are superciliously rejected by the president, with the pert and, the consequences about to follow from its rejection considered, the inhuman remark, 'Oh, no, we will have no law books here'. He seems to have had the same feeling towards a law book that a certain class has towards gas lights. To be sure, if he meant that it was of no use for people to know what they were unwilling to practice, he was right. Still law books are not without their use. They supply weak and frivolous minds with ballast, and occasionally the lessons they contain help to furnish miry and confused intellects with something like a substitute for the qualities which nature has refused to them. Above all, they teach people, whom no more generous feeling can restrain, if for no better reason, from a dread of possible consequence, not to abuse the transient authority, or to insult and injure others, or to exchange harmless insignificance for a sinister importance. We think the study of law books might be beneficial to the president." 42 Law Magazine (1849).

latter attempted to restrict the former's prerogatives, while the former resisted by taking novel and unprecedented steps. The great Civil War was fought on this issue, but from a legal point of view it solved nothing, and it was only with the expulsion of James II in 1688, and the vesting of the Crown on William of Orange, as the Invitee of Parliament, that in fact Parliament established its supremacy over the Crown. What is left of the Crown's original inherent legal authority is known as the Royal Prerogative. The situation is now well accepted that Parliament may over-ride the royal prerogative by legislation, and that even if it legislates so as to occupy the field of prerogative, without actually cancelling the prerogative out, this has the effect of submerging the prerogative for such period as the legislation prevails.

One of the prerogatives left to the Crown after the struggle of the 17th century was the control of the armed forces. However, a a marked distinction was drawn between the Navy and the Army. The Navy was never regarded as a menace to the liberties of the subject. On the contrary the Navy was the instrument of the economic aggrandisement of the Whig magnates who had effected the 1688 Revolution. The Army was a different matter. Cromwell had for some years run the country by martial law, an experience that the English have never forgotten and which has always left the Army a somewhat unpopular institution. Furthermore, James II had built up an Army which was officered substantially by Catholics who had been dispensed from the Test Act by means of one of the more controversial exercises of the royal prerogative, namely that of suspending and dispensing with Acts of Parliament, and this Army was intended as the instrument of James's efforts to bring about religious toleration.

One of the matters paramount in the minds of the revolutionaries in the beginning of 1689 was Parliamentary control of the Army and the elimination of all possibility of a standing Army which could effect a military dictatorship of the Crown. When certain regiments early in 1689 rebelled against William of Orange and indicated their allegiance to the exiled James II, Parliament seized control of the situation by enacting the Mutiny Act of April 1689,[2] which was re-enacted annually until 1878.[3] In the absence of this re-enactment, the Army ceased to have any legal authority.

The problem that immediately arose from the enactment of the Mutiny Act was whether or not it superseded the Crown's power

[2] 1 W. & M., c. 4.
[3] 41 Vict., c. 10.

to administer law for the Army, and the matter was debated hotly in several Parliaments in the 18th century.[4] Before going into this question it is, however, important to outline briefly the growth of military law as an aspect of the prerogative. In the Statute of Westminster of 1279,[5] reference was made to the Royal power to punish soldiers according to the laws and usages of the realm. This power was in fact exercised by the Court of Chivalry or by the Court of the High Constable and Marshal of England according to the Articles of War, which were military codes.[6] The Sovereign himself does not appear to have intervened in the process of criminal trial by these courts any more than he interfered in the process of trial in the civil courts. The royal intervention was in fact limited, as in the civil courts, to exercises of the prerogative of pardon and mitigation. Since it was easy under the feudal system to extend the military jurisdiction into matters connected with the military tenure of land, the lawyers of the 15th century were exercised at the possibility of the military courts entering the jurisdiction of the civil courts. The Act of 1389[7] attempted to effect a relationship between the civil and military courts, but not until the royal power was weakened by the Wars of the Roses did Parliament find the occasion to exercise Parliamentary control over the military jurisdiction. This Act made desertion a statutory offense. It was ratified in 1490,[8] and the Act of 1548[9] gave jurisdiction to the justices of the peace over deserters and introduced offenses respecting the complicity of officers in the improper discharge of private soldiers from this Army.

The Parliamentary forces of the Civil War were subject to a Parliamentary ordinance of 1644, which listed statutory offenses designed to control those fighting the Crown. Among these offenses were those of mutinous assemblies, wilfully permiting prisoners of war to escape and desertion to the enemy. Commissioners were set up to try offenses and to appoint a Judge Advocate and Provost Marshal. Trails by court-martial were held under the ordinance, notably those of the Governors of Plymouth and Hull on a charge of attempting to deliver those towns into the hands of the royal forces. Cromwell seems to have regarded jurisdiction as inherent

[4] Discussed at length in 1 Clode, Military Forces of the Crown, ch. 8 (1869).
[5] 7 Edw. 1, c. 1.
[6] Manual of Military Law, 1958, Pt. II, § 1, History of Military Law, at pp. 4–5. *But see* Squibb, The High Court of Chivalry 5–7 (1959), for the view that while the Constable and Marshal undoubtedly enforced Articles of War, they did not do so while sitting as the Court of Chivalry.
[7] 18 Hen. 6, c. 19.
[8] 7 Hen. 7, c. 1.
[9] 2 Edw. 6, c. 2.

to his office, and, beginning with his reduction of the Levellers to military authority, he extended his jurisdiction without excuse or pretense of Parliamentary sanction to the government of the country by the Major Generals.

After the Restoration, the Army fell again under the Royal prerogative, and the Act of 1663,[10] entitled an Act for the Ordering of the Forces, began by reciting the royal prerogative and admitting that Parliament could not pretend to claim the military jurisdiction. The Lord Lieutenants were the persons ultimately responsible in the Counties for the maintenance of discipline and they were royal appointments. The Bill of Rights of 1689[11] referred to the raising and keeping of a standing Army in time of peace as being contrary to law without the consent of Parliament, and the Mutiny Act was the technique whereby the Crown was authorized to maintain an Army for a period of twelve months.

II. THE MUTINY ACT

The Mutiny Act authorized the Crown to constitute courts-martial with power to try, hear and determine crimes or offenses according to the Articles of War, and to inflict penalties by sentence, provided that there might be no punishment extending to life or limb for any crime not expressed to be punishable by the Act. In each Mutiny Act the Crown was given the power of forming Articles of War for the better government of His Majesty's forces. It will be immediately obvious that questions of the limits of the Crown's discretion to declare acts criminal by Articles of War and to impose punishments were called in question. The view was taken[12] that the penalties which it was competent for the Sovereign to decree by his own authority must be of a very slight and subordinate nature and calculated merely for the enforcement of good discipline. It did not follow, however, that the only crimes punishable by a court-martial were such as were enumerated in the Articles of War, for it came to be admitted that there was a residual prerogative power at all times to make and issue regulations for the Army, independent of those made by the Articles of War. Courts-martial, however, were incompetent, with respect to such additional crimes, to punish according to life and limb. As an example of such additional crimes, one may take the very common offenses described as conduct unbecoming to an officer and a gentleman, or conduct prejudicial to good order and mili-

[10] 15 Charles 2, c. 14.
[11] 1 W. & M., c. 2.
[12] Tytler, Treatise on the Law of Courts-Martial 8 (1790).

tary discipline. From time to time, the War Office issued regulations and promulgated general orders in which reference was made to these crimes. Historical jurisdiction over them, despite their imprecision, derived from the theory that a court-martial was a court of honour descended from the Court of Chivalry,[13] and that a man was being tried by his Peers for what was fundamentally a breach of honour. From time to time the Articles of War made reference to these offenses and, while specifying no description, authorized courts-martial to inflict corporal punishment not extending to life or limb on any soldier for immoralities, misbehaviour, or neglect of duty.

Another aspect of the prerogative which came in question after the Mutiny Act concerned the power of the Crown to try by court-martial someone discharged from the service. The question arose in the case of Lord George Sackville, who was deprived of his command after the Battle of Minden and discharged from the service. He demanded a court-martial and the question whether he could be granted one was referred to the opinion of twelve judges in 1760, who unanimously declared themselves in favour of the legality of the jurisdiction of a court-martial in these circumstances.[14]

The problem of reconciling military law with the law of the land arose in many forms. In particular, the question was debated whether command influence could be brought to bear upon a court-martial, and this was discussed under the general heading of the Crown's power. The royal authority was delegated by sign manual or warrant to any general officer to constitute courts-martial within a particular territory of the Crown's dominions, and this was said to have terminated for the time being the royal authority until the court had pronounced judgment. It was concluded that the Crown could not interfere with the procedure or the conduct of a trial or alter the sentence in any particular unless a recommendation was made by the President of the court. The Crown could, however, under the exercise of the prerogative of mercy, remit or reduce the penalty. The outcome of this debate ensured as far as possible, and at least in theory, the immunity of a court-martial from command influence. Whether it ensured it effectively will be discussed a little later.

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[13] This is the position taken in 1 Holdsworth, History of English Law 573–74, n. 1 (6th ed. 1938). Squibb argues that this view is due to an erroneous confusion of the "office" of the Constable and Marshal and the judicial functions of the Court of Chivalry. Squibb, *op. cit. supra* note 6, at 6.

[14] Tytler, *op. cit. supra* note 12, at 133.

Another question that became prominent in the 18th century was whether military law does or does not supersede civil law. Section 8 of the Mutiny Act said that nothing in that statute should exempt or be considered to exempt any officer or soldier whatsoever from being proceeded against by the ordinary courts of law. Hence, it appears that soldiers remained bound by the laws of the country and amenable to the jurisdiction of the ordinary courts. Two important results flowed from this interpretation of the exercise of Parliamentary authority. The first was that no crime for which the common law or statute law provided a punishment was cognizable before a court-martial except when martial law was proclaimed. This has had the effect of gradually diminishing the jurisdiction of courts-martial. The second conclusion was that, even though a soldier might be charged before a court-martial and either convicted or acquitted with respect to a military offense arising out of a particular course of conduct, he could subsequently be tried before a civil court with respect to an ordinary criminal law charge. The converse, however, was not true, and any conviction so entered in a civil court operated as a bar to trial by a military court. The effect of this is still with us, for the most recent legislation in the United Kingdom, the Army Act, 1955,[15] provides for a plea of *autrefois convict* or *autrefois acquis* in a court-martial when the act has been the subject of jurisdiction of a civil court, but not in a civil court when it has been the subject of jurisdiction of a military court. The relationship of the two judicial systems seems thus to be imperfect, and its imperfection stems from the compromise reached in the 18th century between the exponents of the royal prerogative and those of Parlimentary authority.

A final and important aspect of that struggle remains to be mentioned, and that was control of the military jurisdiction by the civil. No sentence of a court-martial was complete until approved of by the Crown or by a commander in chief having that authority delegated to him by special commission. The sentence of a court-martial subject to review could be appealed from to the civil courts by means of a writ of error, which was a prerogative writ designed to bring about the amenability of executive judicial bodies to the jurisdiction of the ordinary courts of the land. The causes for which sentence of a court-martial might be quashed by the civil courts were, for example, where the verdict was contrary to evidence or the decision was unauthorized by law, or the penalty was exorbitant. However, this could in no sense be described as

[15] 3 & 4 Eliz. 2, c. 18.

a real form of appeal because the prerogative writs were, and remain, defective in that they operate only with respect to abuse of authority which is disclosed by the record. It was not until after the Second World War that a proper system of military appeals was in fact instituted,[16] and that military law could, as a result, be said to be a systematic branch of British judicial activity.

III. BLACKSTONE'S CONCEPT OF MILITARY LAW

The imperfect nature of military law as a manifestation of executive power led many in the 18th century to conclude that it was not properly law at all. Blackstone, for example, gave utterance to the following well known views:

> Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as law. The necessity of order and discipline in an army, is the only thing which can give it countenance: and therefore it ought not to be permitted in time of peace, when the King's Courts are open for all persons to receive justice according to the laws of the land.[17]

What gave substance to Blackstone's contention was the introduction of the words "in time of peace" into the Mutiny Act in 1702.[18] This suggested to some minds that military law operated only in time of war, and that in time of peace the jurisdiction of the civil courts was exclusive and the military courts could deal with only minor disciplinary matters, the sort of matters now dealt with summarily by a commanding officer. The question of interpreting these words arose in the Court of Common Pleas in 1792 in the case of one Sergeant G. S. Grant,[19] who took out a writ of prohibition against the execution of a sentence of a general court-martial. In the course of the hearing, the Lord Chief Justice of the Common Pleas dealt with the argument that pursuant to the Mutiny Act there was no competence to try otherwise than in respect to that Act in time of peace. In particular, he dealt with the question whether a court-martial had a discretion with regard to punishment when the punishment was not strictly defined by the Act. It was held that in virtue of the necessity of maintaining discipline, such a discretion existed.

Blackstone has been regarded by many writers on military law as having done the subject a grave disservice, and as having been

[16] Court-Martial Appeals Act, 1951, 14 & 15 Geo. 6, c. 46.
[17] 1 Blackstone, Commentaries on the Laws of England, c. 13 (1765).
[18] 1 Anne, c. 16.
[19] Tytler, *op. cit. supra* note 12, at 23.

responsible for perpetuating the more unsatisfactory aspects of it. Be that as it may, the Blackstone point of view had its supporters among the line officers of the Army, who were only too anxious to have military law regarded as a disciplinary function and not law at all.[20] The prevalence of this attitude of mind may explain why it was that accused before courts-martial were not entitled to be represented by lawyers until the last decades of the 19th century. Even Tytler, who most ably refuted Blackstone, supported this policy, arguing that lawyers being in general "as utterly ignorant of military law and practice as the members of a court-martial are of civil jurisprudence and the forms of the ordinary courts" thought that nothing could result from the efforts of defense counsel to make every point in favour of the accused, save "inextricable embarrassment or rash, ill founded and illegal decisions."[21] He thought, however, that counsel could assist in the defense by suggesting fit questions to the witnesses, or in drawing up in writing a connected statement of the defense, and this benefit he said a court would never refuse to a prisoner.

IV. RESOLUTION OF CONFLICTS IN THE RULES OF EVIDENCE

The Mutiny Acts extended to troops on the establishment in the United Kingdom and Gibraltar, and in the Middle of the 19th century those in India. Troops in the colonies fell either under the prerogative exclusively, as in the early settlement of New South Wales, or, where responsible government had been granted, under Acts of the local legislature. This has led to some confusion concerning what law it is that is applied by a court-martial in any given part of Her Majesty's dominions. In Australia, for example, there is no federal criminal law, except for very restricted purposes, and hence no general corpus of federal law which could be imported into court-martial proceedings, despite the fact that the Army is a federal instrumentality. The six States have their own separate systems of law which do not radically differ, but are certainly not uniform. When a disputed question arises, is a court-

[20] In a very amusing work published in 1837 entitled Remarks on Military Law and the Punishment of Flogging, Major General Charles Napier of Peninsular War fame gave expression to a typical service view on this matter. He clearly regarded all lawyers as humbugs, and the less the Army had to do with them the better. Napier himself was a reformer and a liberal, and his book contains many humanitarian expressions respecting the usefulness of corporal punishment, so that he could hardly be described as giving expression to a reactionary point of view.

[21] Tytler, *op. cit. supra* note 12, at 250.

martial to draw upon the law of the State in which the trial is being held or the law of the United Kingdom, or what?[22]

The point is by no means a novel one because throughout the 18th century the question whether a court-martial was bound by the rules of English Criminal Law and Evidence was debated. Tytler concluded that "the rules of evidence which have their foundation in the principles of justice and of reason are the same that apply to the trial of crimes before the civil courts."[23] Reference to the ordinary rules of evidence was also made in the Articles of War. However, certain peculiar features of military, as distinct from civil, justice led to a neglect in courts-martial of certain of the elementary principles of the criminal law administered in civil courts. For example, until well into the 19th century, the charge did not refer to specific provisions of the Articles of War or the Mutiny Act, but merely specified that the accused was alleged to have done such and such an act. This was a sufficient intimation to him that the offense was considered by the prosecutor to be a breach of military law. Tytler justified this policy on the argument that reference to the relevant enactments "may lead to cavelling and captious objection."[24]

Witnesses were frequently called on to give evidence, not so much as to fact, but as to opinion based on military experience. In the trial of Lord George Sackville, who was mentioned earlier, a question was put to a company commander whether the repeated orders of Prince Ferdinand to support the infantry were fully executed by the cavalry. He objected to answering the question on the ground that he could only form an opinion, not state a fact. Lord George required the court to decide how far the witness should be allowed to speak of matters of opinion. The court thought that the question was properly put and should be answered. On the other hand, in the trial of Lieutenant Colonel

[22] The question confronted me on one occasion when sitting as judge advocate on a trial of perjury when the accused contended that since he had admitted during the course of the original proceedings in which he was a witness that he had lied in those proceedings, he had purged his guilt. The proposition gained little support from any of the recognized authorities on English law, and the two most recent decisions where the matter had been canvassed were in conflict, and neither of them was given in a relevant jurisdiction. One was a decision of the United States Supreme Court and the other a decision of the Northern Territory of Australia. In advising the court how to deal with the plea, I suggested that it was not bound by any given system of law in Australia, except those general principles of English law which are indisputably common to all jurisdictions. In consequence, the court could make up its own mind whether to accept or reject the plea, thereby making its own law. The court rejected the plea.

[23] Tytler, *op. cit. supra* note 12, at 258.

[24] *Id.* at 216.

Cockburn for the surrender of St. Eustatius, a witness was asked whether in his opinion the accused shamefully gave up the post. Since the question called for an opinion involving a judgment on the whole charge, it was disallowed.

Again, the question of condonation calls for a purely military appreciation of the evidence. Accused frequently raise as a plea in bar that, by being retained, after the facts are discovered, in a position of responsibility, they have been tacitly pardoned. Characteristically, the plea is raised by a mess steward accused of stealing mess funds who has nonetheless been kept on in that post to the date of trial. Courts have very little to guide them in making up their minds on this point. The Australian Manual of Military Law quoted Clode's reference to the Duke of Wellington's views on the subject, and cites an instance where an ensign under charge was held to have been pardoned by being permitted to carry the colours—a position of honour—during a Peninsular War battle. In fact this discretion of the court to make up its own mind as to what constitutes condonation tends to lead to difficulties with the administration, who have been known to reconstitute the court after a plea of condonation has been upheld, thereby in effect over-riding the court's decision and giving the prosecution a second chance.[25]

One of the most difficult matters of integrating military law and the ordinary rules of the criminal law arises in the matter of confessions. In 1915, the judges in the United Kingdom laid down certain rules known as the Judges' Rules, relating to the warning of an accused by the police at the time of his arrest that anything that he says may be taken down and used in evidence against him. These are rules of the court and not rules of law, and consequently they cannot be said to form part of the *corpus* of military law. The Manual goes no further than to say that if the Judges' Rules are complied with there is little doubt that the evidence of the confession is admissible, but that if they are not complied with, then the prosecutor must satisfy the court that the confession was made voluntarily. Needless to say, there is a tendency on the part of the Provost people not to warn when making an arrest, but at the same time to interrogate. It is very difficult to establish that any inducement or duress on the part of the previous interrogators led to the making of the confession, and in the result there is a strong tendency for a court-martial to regard the confession as voluntary and thereby admissible, if only because there is a tendency to

[25] This has happened in the experience of the author. For power to dissolve and reconstitute as a matter of the common law of the Army, after a plea of condonation had been upheld, see R. v. Divken, [1953] 2 Q. B. 364.

regard military practices as normal, whereas in fact in the eyes of a civilian lawyer they may be far from such.

An illustration of the difficulties raised in this matter by undue deference to military procedures is offered by a decision of the Court-Martials Appeal Court in England which reversed a ruling of the judge advocate in a trial arising out of a killing which took place in the course of a riot between two British regiments in Germany.[26] The regimental sergeant major of one regiment lined the battalion up on the barrack square on the evening of the event and threatened that no one would be allowed to go to bed until someone admitted that he had stabbed the victim with a bayonet. For some time the battalion stood fast but eventually one man admitted that he did it. He was marched off to the guard house and the following morning interrogated by the military police. He refused to speak. The only evidence against him was his admission on the barrack square. The Appeal Court held that this was inadmissible evidence since the sergeant major's threat constituted either duress or an inducement.

V. FEATURES OF CONTEMPORARY PRACTICE

Certain features of the contemporary court-martial practice in British countries may now be isolated in the light of this historical survey which will serve as a sufficient explanation of the peculiarities to be mentioned.

Military law in the United Kingdom has now been reduced substantially to statutory form in the Army Act, 1955, which is the lineal descendant of the Mutiny Act. In Australia the law is found in the Army Act and regulations made thereunder. In the United Kingdom, courts-martial have jurisdiction over enumerated offenses in Part 2 of the Army Act, except civil offenses of murder, manslaughter, treason, treason felony and rape if committed in the United Kingdom. In Australia the offenses are likewise enumerated but exclude most of the serious offenses. In the United Kingdom Act, maximum penalties are specified and provide for two years detention as a typical penalty. In Australia, 90 days is the maximum penalty that can be given in time of peace, and the difference in policy between the two countries represents differing views on the respective roles of the civil and military jurisdictions. In Austrialia, where the regular army is relatively small, and where forces are not, except at battalion strength, committed in time of peace overseas, it has been found practicable to leave the

[26] R. v. Smith, 43 Crim. App. R. 121 (1959).

civil authorities to deal with matters such as theft, arson and assault, reserving for the military courts purely military offenses such as misuse of motor vehicles, insubordination, and striking a superior officer. Where, for some good disciplinary reason, the Army wishes to exercise jurisdiction over an offense which is at the same time a civilian crime, it has no hesitation in doing so. The United Kingdom Act, subject to section 16 of the Court-Martials Appeals Act, provides that a person who has been tried by a court-martial is liable, if his offense was committed within the jurisdiction of a civil court in the United Kingdom, to be tried subsequently by that civil court for that offense, but that a person who has been acquitted or convicted by a civil court cannot be tried under the Army Act. To avoid a double trial it is said to be "not expedient for the Army to exercise its powers without consulting the civil authorities, and it is usual for them to come to an agreement as to the exercise of jurisdiction in any particular case."[27]

Although military officers are scrupulous in their endeavours to be fair to the accused, command influence of one sort or another is difficult to eliminate, given the present method of control. In Australia, the adjutant general's branch is responsible for the convening of the court, the appointment of officers, the appointment of the prosecutor, the collection of evidence, the briefing of witnesses, the appointment of the judge advocate, and all matters connected with the papers pending confirmation. At each of these points, it is theoretically possible for the administration to exercise its influence. Usually, it knows a good deal more of the background story than could, owing to the exigencies of the law of evidence, come out in a court. Consequently, it is tempted to select the evidence on the way it thinks the trial should go. Furthermore, the prosecutor is rarely a lawyer and he tends to rely excessively on the advice of the administration and on the material which it provides for him. Very often the administration does not sufficiently appreciate the problems of proof and either misdirects the prosecutor or fails to produce a material witness. Many prosecutions are ineptly conducted and in some cases this is an advantage to the accused, but in other cases it is a disadvantage. In either event, the result does not sufficiently serve the demands of justice. In the United Kingdom the problem has been minimized by separating the prosecutions' branch from the judge advocate general's branch, and having the prosecutions conducted by legal officers. This parallels the ordinary method of prosecution in the civilian courts.

The role of the judge advocate is decisive in assessing the

[27] Manual of Military Law, *supra* note 6, at p. 130.

judicial character of a court-martial. The British judge advocate is neither judge nor advocate, and his role is anomalous in the context of modern systems of justice. A brief historical survey of this role is illuminating. The Articles of War in the 18th century state that the judge advocate was to "inform and prosecute." The word "inform" implied the distinct duty of instructing or counselling the court by way of explanation of points of law and was supplementary to what was said in the Articles of War or the Mutiny Act. It was seen as part of his duty to ensure that the accused got the benefits of the application of those rules of law which were regarded as fundamental to the protection of his life and liberty. The incompatibility of this function of informing with the function of prosecuting does not seem to have been adverted to, because it was considered that the judge advocate, since he had no determinative voice in the sentences or interlocutory opinions of the court, exercised no judicial power. Inconsistency, however, there must necessarily have been, for the judge advocate a discretion as to how and when he would advise the court, and it would require a character of some rarity to preserve a proper balance between the function of getting a conviction, when the facts known to the judge advocate as prosecutor in his opinion warranted a conviction, and the informing of the mind of the court of the technical rules of law which might make that conviction difficult to obtain.

The inconsistency was aggravated by the duty which the judge advocate had of assisting the prisoner in the conduct of his defense. Since the prisoner was not allowed legal counsel, the judge advocate was supposed tc ensure that he received justice. In doing so, he was not to "substitute himself as counsel for the defence to exercise his ingenuity to defend the prisoner at all hazards against those charges which in his capacity of prosecutor he is bound to urge,"[28] but he had to occupy that same position of defender of the liberties of the subject which a judge in a civilian court exercised. It was said to be the duty of the judge advocate to instruct himself in all the circumstances of the case and to require of the prisoner a list of those witnesses whom he intended to adduce. The judge advocate in effect must have examined the witnesses for the prosecution and the witnesses for the defense, as well as acting as recorder for the court. This dual, even triple function, was exercised until late in the 19th century. Clode says that the last occasion where a judge advocate prosecuted was in the trial of Colonel Crawley in 1865.[29]

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[28] Tytler, *op. cit. supra* note 12, at 356.
[29] 2 Clode, *op. cit. supra* note 4, at 364, 750.

Although the judge advocate now no longer prosecutes, he still finds himself in a delicate position due to the survival of the tradition that he is adviser to the court and to both parties. The Army Act provides that the prosecutor and the accused are entitled to his information on any question of law or procedure. At the same time it is his duty to sum up the evidence and advise the court upon the law relating to the case, and it is his duty to ensure that the accused does not suffer any disadvantage in consequence of his position or of his ignorance or incapacity to examine or cross-examine witnesses or to make his own evidence clear and intelligible. The difficulties of the judge advocate's position are minimized if the trial is properly conducted with legal officers as both prosecuting and defending counsel. Then, indeed, the proceedings can run like those of a normal court. This is currently the situation in most courts-martial in the United Kingdom. In time of war, however, and in Australia usually in time of peace, legal officers may be unavailable to act as prosecution and defense, and in extreme instances the judge advocate's position can become untenable. If both prosecution and defense are inept he finds himself, in virtue of his duty of adviser, telling the prosecutor what he must do and telling the defense what he must do to counter it. He must suggest the legal issuses to both sides, and then, in effect, adjudicate upon them.

It is this question of adjudication that is at the heart of the problem. In theory, the judge advocate is not a judge, but an adviser to the court. The effective decision maker is the President, and a strong President can ride a case so as to minimize the significance of the judge advocate. Most points of law are taken in an interlocutory fashion. The judge advocate delivers his advice in open court. The court then closes and the members decide on their ruling in the judge advocate's absence. When the court is reopened, the accused is told that his point has either been taken or rejected, and no one can do more than guess whether the members of the court have taken the judge advocate's advice seriously. In Australia, there is no power in the judge advocate to deal with these interlocutory points on his own authority and much depends on his own personality and that of the President. In the United Kingdom, the President has a discretion to permit any points of the admissibility of evidence to be determined by the judge advocate sitting alone, and this is a considerable improvement on the older practice.

VI. CONCLUSION

From what has been said it is evident that British military law has not succeeded in disengaging itself from the considerations which permitted its development in the 18th century. It remains anomalous, and there are considerable service pressures inhibiting its modification. It is perhaps difficult to devise a system of military law which effectively reconciles the conceptions of criminal justice which prevail in a civilian community with the concept of military discipline. The elimination of command influence is perhaps unrealizable, even where the person conducting the trial has the functions of a proper judge. The reason is that, whereas a civilian prosecution is taken by the police, who have only a general interest in the maintenance of the social structure, military proceedings are initiated by those officers most *directly* concerned with the preservation of the military system.

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ANALOGY REINCARNATED: A NOTE ON THE FORM AND SUBSTANCE OF SOVIET LEGAL REFORM.* The problem inherent in the study of a foreign legal system is greatly magnified when one is confronted with a relatively closed society where meaningful comparisons between law as written and practiced cannot be made. Distinctions of form and content, a Stalinist predilection providing an otherwise useful approach to the study of Soviet law, can rarely be employed as one is seldom presented with concrete evidence of the precise line of demarcation between facade and reality. Oftentimes the observer experiences the uneasy frustration of the night watchman who senses the presence of a trespasser but uncovers nothing untoward in the course of his nightly rounds. The reform involving the alleged abolition of the principle of analogy, long a source of criticism of Soviet criminal law, presents a singular opportunity to consider a Soviet legal development in the context of the primacy of substance over form.

I. DEVELOPMENT OF THE ANALOGY PRINCIPLE

Although developed and known in Soviet practice during the period from October 1917 to May 1922, the principle of analogy was first codified in the Criminal Code of 1922.[1] The adoption of the principle represented a break with the Tsarist past as the Penal Code of 1903 had codified the principle of *nullum crimen nulla poena sine lege*,[2] the antithesis of analogy.[3] After the formation of the U.S.S.R. in 1923, the principle of anology was continued in the "Basic Principles of the Criminal Law of the U.S.S.R.," promulgated in 1924. Thereafter, until the adoption of the Law of 25 December 1958, "Fundamentals of Criminal Legislation for the USSR and the Union Republics,"[4] the princi-

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] Starosolskyj, The Principle of Analogy in Criminal Law: An Aspect of Soviet Legal Thinking 7 (1954) (Research Program on the U.S.S.R.).

[2] "No crime, no punishment without pre-existing law," *i.e.*, "no penalty should apply to an act unless the act contains elements specified by a penal statute." Library of Congress, Mid-European Law Project, Highlights of Current Legislation and Activities in Mid-Europe 7 (Vol. 7, No. 1, January 1959).

[3] Starosolskyj, *op. cit. supra* note 1, at 4.

[4] Pravda and Izvestia, Dec. 26, 1958, and Vedomosti, Item No. 6 (1959). The official translation is contained in Fundamentals of Soviet Criminal Legislation, the Judicial System and Criminal Court Procedure (1960).

ple of analogy remained in the basic federal principles and, as a consequence, an integral part of the criminal codes of the constituent republics. The principle in its codified form, read as follows:

> In a case where a socially dangerous action is not provided for by the criminal law, the court shall find the basis and limits of responsibility as well as the means of social defence by analogy with those articles of the criminal codes which provide for crimes most similar as to importance and kind.[5]
>
> If a socially dangerous act is not directly covered by the Code, the basis and limits of punishment for it shall be determined by applying the sections of the Code which deal with crime most closely resembling the act.[6]

The principle of analogy, once characterized by Vyshinsky as an "inevitable and unavoidable" part of the Soviet legal system[7] was adopted to fill gaps in Soviet criminal legislation as a means of protecting the regime against hostile elements.[8] This purpose is noted in a Soviet commentary as follows:

> At the session of the All-union Central Executive Committee which approved the first draft of the Criminal Code of the Russian Soviet Federated Socialist Republic it was apparent that a single code could not possibly encompass all the varieties of crime and that gaps therein could not be avoided. In order to effectively combat crimes dangerous to the government of the Soviet Union and its legal order it was necessary to include in the criminal code a provision on analogy. Such provision enabled the court to react quickly to crimes not covered by the code without the necessity of waiting until new criminal codes were promulgated.[9]

Further, it is said that, after the adoption of the Stalin Constitution in 1936 and the concomitant emphasis on the "stability" of the law, the principle of analogy had a "more limited" application.[10]

The official Soviet commentary on the alleged reform of 25 December 1958 discusses the principle of analogy as follows:

> The new Fundamentals completely reject the principle, contained in the 1924 Basic Principles, that permitted the court to award certain penalties, e.g., transportation and exile, in cases where no definite, concrete crimes had been committed; the cases concerned persons who had not been convicted of a crime but had been declared a danger to society on account of criminal activity or their connection with criminal circles in a given locality.

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[5] Basic Principles of Criminal Law of the U.S.S.R., 1924, art. 3, as translated by Starosolskyj, *op. cit. supra* note 1, at 35.

[6] R.S.F.S.R. Criminal Code art. 16 (1953) (U.S.S.R.).

[7] Starosolskyj, *op. cit. supra* note 1, at 79.

[8] Men'shagin, Ugolovnoe pravo, obshchaia chast' (Criminal Law, General Part), pp. 244–45 (1948).

[9] *Id.* at 246.

[10] *Ibid.*

> Actually the infliction of a penalty on grounds of danger to society alone has not been practised in recent years. . . .[11]

Thus, the essential elements of analogy in Soviet practice emerge. Codification of the principle provided legislative authority for the imposition of a criminal penalty[12] upon an individual who, although not guilty of a specific crime, was determined by a court to be "a danger to society." A Western observer noted the impact of the principle of analogy on the individual as follows:

> This system . . . undermined the legal security of Soviet citizens who could have committed 'offences' never expressly forbidden by criminal legislation. It gave arbitrary powers to the judges who had the right to convict according to their individual understanding of what was socially dangerous. . . .[13]

II. THE 1958 REFORM

The reform of 1958 is said to have repudiated the principle of analogy. This has been accomplished technically by omission of the codification of the principle and the inclusion of provisions to the effect that only conduct specifically proscribed by a criminal statute shall be considered criminal. Article 1 of the Law of 25 December 1958, *supra*, provides that "criminal legislation for the USSR and the Union Republics defines the socially dangerous acts that are to be classed as crimes. . . ." Article 3 limits criminal liability to the deliberate or negligent commission of any of the socially dangerous acts "defined by the criminal laws." Article 7 defines crime as "a socially dangerous act . . . *prescribed in criminal law*, that transgresses against the Soviet social or state system, the socialist system of economy, the person and the political, labor, property, and other rights of a citizen and also any other act that transgresses against socialist law and order and *is defined in criminal law as dangerous to society.*"[14] The claimed effect of the foregoing provisions is "reject [ion of] the possibility

[11] Fundamentals of Soviet Criminal Legislation, *op. cit. supra* note 4, at 30.

[12] "Transportation and exile" are cited as examples of the penalties commonly imposed. Under Soviet criminal law, "transportation and exile" are two similar but separate punishments. Common to both is "the removal of a convicted person from his place of residence." The difference is that the former involves "obligatory settlement in a definite area," whereas the latter imposes only a "prohibition to live in certain places" (Article 24, Law of 25 December 1958, *supra*). The official Soviet translation "transportation and exile" (Fundamentals of Soviet Criminal Legislation, *op. cit. supra* note 4, at 14) leaves much to be desired. The translation "exile and expulsion," appearing in the Library of Congress translation of Article 24 appears to be more appropriate. See Highlights, *op. cit. supra* note 2, at 26.

[13] Kulski, The Soviet Regime, Communism in Practice 445 (3d ed. 1959).

[14] Fundamentals of Soviet Criminal Legislation, *op. cit. supra* note 4, at 5–7 (emphasis added).

of passing sentence on an accused from motives of his danger to society alone."[15] At the time of the presentation of the draft which was subsequently enacted as the Law of 25 December 1958, *supra*, the Chairman of the Drafting Committee, D.S. Polianskii, stated that under the proposed legislation Soviet courts should no longer "apply the statute by analogy, i.e., convict anyone for an act which is not directly specified by a penal statute."[16] Taken as its face value, this statement indicates that the principle of *nullum crimen, nulla poena, sine lege*, had been incorporated into the Law of 25 December 1958, *supra*.[17]

III. SOVIET REFORM IN PRACTICE

In the context of the dichotomy of form and content, facade and reality, the Soviet claim of reform must be subjected to the test of practice. The claim can be accepted[18] only if, in fact, the basic element of analogy, "passing sentence upon an accused from motives of his danger to society alone" in cases where a specific provision of the criminal code has not been violated, is no longer a part of the Soviet legal system. If that basic element is still present, the formal repudiation of analogy should not be permitted to cloak the substance of "socialist legality" in this critical area.

During the 20th Party Congress in 1956, Khrushchev noted in his Central Committee Report the presence of harmful, antisocial elements in Soviet society and the need to eradicate them. He stated:

> A great historical achievement of our party is that under the socialist system new people have developed, active and conscientious builders of communism. But it would be wrong to think that the survivals of capitalism in the minds of people have already been wiped out. Unfortunately, in our fine and industrious Soviet family one can still meet people who do not participate in productive labor, do not perform socially useful work either for the family or for society. One can also meet people who maliciously violate the rules of the socialist community. It is impossible to stamp out these ugly manifestations merely by administrative measures, without the participation of the masses themselves. In this matter, public opinion plays a great role. It is necessary to create such an atmosphere that people who violate standards of behavior and the

[15] *Id.* at 31.

[16] Izvestia, Dec. 26, 1958, p. 10, as translated in Highlights, *op. cit. supra* note 2, at 8.

[17] Highlights, *op. cit. supra* note 2, at 8.

[18] Many Western observers (*e.g.*, Kulski, *op. cit. supra* note 13, at 445; Highlights, *op. cit. supra* note 2, at 9), have accepted the claim but reserved judgment on the ameliorating impact of the "reform" on the overall administration of Soviet criminal law.

> principles of Soviet morality will feel that the whole of society condemns their actions.[19]

Khruschev's call to action was answered by legislative proposals in most of the constituent republics directed at the "intensification of the struggle against anti-social, parasitic elements."[20] These legislative proposals were essentially the same[21] and generally provided that "adult citizens . . . who lead an anti-social, parasitic way of life or who maliciously evade socially useful work, . . . [or] who live off unearned income may be subjected to . . . deportation by a public judgment [*i.e.*, by majority vote of a general meeting of local citizens] for a period of from two to five years with compulsory labor at the place of deportation."[22] The first of these proposals was enacted into law in the Uzbek Republic in May 1957.[23] By January of 1959 similar legislation had been enacted in the Turkmenian, Latvian, Tadjik, Kazakh, Armenian, Azerbaijan and Kirghiz Republics.[24]

The enactment of this legislation did not end the struggle against anti-social, parasitic elements. In 1960 a Soviet commentary noted this as follows:

> The general moral condemnation of those who live as parasites off the healthy body of our society is becoming more intensified. This reflects the heightened level of consciousness of the masses in their burning desire to overcome all that stands in the way of the creation of communism, the society which satisfies the highest ideals of man.[25]

At the January 1961 Plenum of the Central Committee of the Communist Party of the Soviet Union, Khrushchev stated:

> It is necessary to mercilessly eradicate the evil of parasitism, the negative attitude towards labor, and the psychology of private ownership. An uncompromising struggle must be waged against the survivals of capitalism. In this struggle it is necessary to combine measures of social influence with strict administrative penalties.[26]

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[19] 2 Current Soviet Policies: The Documentary Record of the 20th Communist Party Congress and Its Aftermath 54 (Gruliow ed. 1957).

[20] Kulski, *op. cit. supra* note 13, at 481.

[21] *Ibid;* Shliapochnikov, Sovetskoe zakonodatel'stvo i obshchestvennost' v bor'be s paraziticheskimi elementami (Soviet Legislation and Public Opinion in the Struggle Against Parasitic Elements), Sovetskoe Gosudarstvo i Pravo, August 1961, pp. 61–70.

[22] See Highlights, *op. cit. supra* note 2, at 405–409 (Vol. 5, Nos. 9–10, September-October 1957), for English translations of the legislative proposals.

[23] Shliapochnikov, *op. cit. supra* note 21, at 64.

[24] *Ibid;* Kulski, *op. cit. supra* note 13, at 481; see, *e.g.*, The Law of 15 October 1957, "Intensification of the struggle against anti-social, parasitic elements" of the Latvian Republic, the text of which appeared in Sovetskaia Latviia (Soviet Latvia), October 15, 1957, p. 1.

[25] Shliapochnikov, *op. cit. supra* note 21, at 61, quoting portion of an article which appeared in Kommunist (Communist), No. 14, p. 13 (1960).

[26] Quoted in Shliapochnikov, *op. cit. supra* note 21, at 63.

In response to this additional call for action by Khrushchev, the remaining seven constituent republics enacted "parasite" legislation and important amendments were made by the other republics in legislation then extant. This flurry of legislative activity occurred in May and June of 1961. It was touched off by the enactment in the Russian Republic of the Decree of 4 May 1961, "Concerning intensification of the struggle against avoiding socially useful labor and leading an anti-social, parasitic way of life."[27] The mentioned decree provides pertinently as follows:

> Article 1. Adult, able bodies, citizens who do not wish to fulfill their highest constitutional duty to work at their specialities, avoid socially useful labor, extract unearned income from the use of farm plots, motor vehicles, and living space, *or commit other anti-social acts which enable them to lead a parasitic way of life* are subject, in accordance with the decision of the district (city) people's court, to exile for a period of two to five years with confiscation of property acquired not as a result of labor and compulsory labor at the place of exile.
>
> The same measures may be imposed by decision of a district (city) court or by the public censure of workers' collectives . . . in the case of persons who, working for appearance's sake only and enjoying the privileges and advantages of workers, collective farmers, and employees, actually undermine labor discipline, engage in private enterprise, live on means not produced by their own labor, *or commit other anti-social acts which enable them to lead an anti-social way of life.*
>
> The decision of the . . . court or the public censure to exile may be issued only after the person leading a parasitic way of life has failed to heed, during the time allotted a warning issued by public or governmental agencies that he engage in honest labor.
>
> Article 2. The decision of the . . . court . . . is final and not subject to appeal.
>
> Public censure in the form of exile is subject to confirmation by the executive committee of the district (city) soviet worker's deputies which action is final.[28]

The legislative enactments in the other republics generally follow the decree of the Russian Republic,[29] with certain changes not here pertinent.[30]

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[27] *Id.* at 65–66.

[28] Vedomosti, Verkhovnovo Soveta, RSFSR (Journal of the Supreme Soviet of the RSFSR) No. 18, Item No. 273, pp. 286–287 (1961) (emphasis added).

[29] Shliapochnikov, *Praktika v bor'be s tuneiadstvom* (*Practice in the Struggle Against Parasitism*), Sovetskaia Iustitsia (Soviet Justice), August 1961, p. 7.

[30] For example, under the decree of the Russian Republic, equal competence of the courts and workers' collectives is provided only in cases where an individual works solely for appearance's sake. In all other cases, the court has sole competence. Shliapochnikov, *supra* note 29, at 7. The Estonian decree (Decree of June 11, 1961) gives equal competence in all cases of anti-social, parasitic activities. The Estonian decree provides pertinently:
"Article 1. Adult, able bodied persons who lead an anti-social or parasitic

The principal changes effected by the 1961 legislative enactments were the granting of competence to the people's courts to decide cases arising under the parasite laws and the broadening of permissible penalties to include confiscation of property acquired with unearned income. Under the earlier legislation of 1957–1959, the penalty of exile could be imposed only pursuant to the judgment of a gathering of citizens, such as a block committee or a committee from a large housing development, which had the approval of the executive committee of the local societ of workers' deputies. The introduction of the courts into the administration of the parasite laws[31] added greater formality to a system which had originally been conceived as one of "popular justice."[32] The formulation of the conduct proscribed by the legislation remained broad enough to include all elements in Soviet society which could be considered undesirable or disrupting influences in the "march towards communism."

The stated purpose of the parasite legislation is to make "honest workers" of persons who are leading an anti-social way of life, either through a voluntary mending of ways after formal warning or the imposition of compulsory labor during exile.[33] The preambles to the legislative enactments of 1961 generally contain a statement of the type of activity within their purview as follows:

> . . . [I]n the town, and in the countryside there are still individuals who stubbornly resist honest labor. These persons frequently take a job for

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way of life, avoid socially useful work or work only for appearance's sake and live on means not produced by their labor, may on the basis of the decision of a social organization, collective of workers of the enterprise, shop, collective farm, collective farm brigade, organization or institution, or by decision of the regional (or city) people's court be sent for a period of 2 to 5 years to perform labor in a place set aside for this purpose and have confiscated the property acquired not through their labor." Sovetskaia Estonia (Soviet Estonia), June 11, 1961, p. 1.

[31] The legislation of the Russian Republic has been enacted in substantially the same form by the republics which had no parasite legislation. It was also used as the basis for the amendment of parasite legislation in effect in the other republics (*e.g.*, the decree of May 27, 1961, of the Presidium of the Supreme Soviet of the Lithuanian Soviet Socialist Republic, Sovetskaia Litva (Soviet Lithuania), May 28, 1961, p. 1).

[32] In September 1961 the Plenum of the Supreme Court of the USSR issued a decree in which it established "guiding explanations" for use by the courts in applying the parasite laws. Decision No. 6, Plenum of the Supreme Court of the USSR, "Concerning the practice of the courts in applying the legislation concerning the intensification of the struggle against persons avoiding socially useful labor and leading an anti-social, parasitic way of life" (September 12, 1961) in Biulletin' Verkhovnovo Suda, SSSR (Bulletin of the Supreme Court, USSR), No. 5, pp. 8–11 (1961).

[33] Shliapochnikov, *op. cit. supra* note 21, at 65–67; Decision No. 6, Plenum of the Supreme Court of the USSR, *supra* note 32, at 9.

> appearance's sake but actually live on unearned income and enrich themselves at the expense of the state and the working masses; or, even though able to do so, do not work at all; engage in forbidden industries, private enterprise, speculation, and begging; derive unearned income from the use of personal vehicles; employ hired labor; receive unearned income from dacha and other plots of land; construct homes and dachas from unearned means using for this purpose unlawfully acquired building materials; and *commit other anti-social acts*. . . .
>
> It is essential to conduct a resolute struggle against anti-social parasitic elements until the complete eradication of this shameful manifestation in our society. . . .[34]

The catch-all phrase, "other anti-social acts" is also a part of the statutory formulation of the conduct proscribed by the parasite legislation. This general formulation and the serious punishment provided for conduct falling within its proscription inevitably recall to mind the principle of analogy under which it was possible to "pass . . . sentence on an accused from motives of his danger to society alone."[35] The cast of the new formula in terms of anti-social or parasitic behavior does not change the basic technique of severe punishment for conduct which does not violate specific provisions of the criminal code. Punishment in violation of the principle *nullum crimen nulla poena, sine lege* remains a part of the Soviet legal system.

IV. CONCLUSIONS

In 1954 a Western observer prophetically commented that ". . . analogy appears unavoidable in the USSR. This holds true because the principle of *nullem crimen sine lege* and the rule of law are not in accord with the basic Marxian or Soviet concept of law and legality or with Soviet 'democracy.' "[36]

How do the Soviets reconcile the parasite legislation with the much heralded reform of 25 December 1958? Have the Soviets overlooked the mandate of Article 3 of the Law of 25 December 1958, *supra*, that "only a person . . . who has, either deliberately or by negligence, committed any of the socially dangerous acts *defined by the criminal laws*, is deemed liable to criminal . . . punishment . . . ."?[37] They have not. With the semantic legerdemain for which Soviet theorists are noted, the basic conflict between the parasite legislation and the new fundamental principles of

[34] Preamble to the Decree of May 4, 1961, of the Russian Republic, Vedomosti, *op. cit. supra* note 28, at 286 (emphasis added).

[35] Fundamentals of Soviet Criminal Legislation, *op. cit. supra* note 4, at 31.

[36] Starosolskyj, *op. cit. supra* note 1, at 81.

[37] Translated in Fundamentals of Soviet Criminal Legislation, *op. cit. supra* note 4, at 6 (emphasis added).

criminal law has been "reconciled" by simply characterizing the former a system of "administrative" punishment. Despite the fact that the serious penalities provided under the parasite legislation (*e.g.*, exile, confiscation of property) are among the basic criminal penalties enumerated in Article 21 of the Law of 25 December 1958, *supra*, and the repeated calls for increased formalities and safeguards to insure "correct and just" decisions because of the severity of the penalities provided,[38] the Soviets insist that the procedures and punishments under the parasite legislation are properly characterized as "administrative" and not criminal.[39] The Soviet line of reasoning in support of this characterization in specious. The essence of the argument is that the penalties under the parasite legislation cannot be criminal because no crime has been committed. A Soviet commentary states the argument as follows:

> . . . [I]t should be stressed that . . . the measures of governmental compulsion in the case of parasitic elements are considered measures of an administrative nature. These measures are qualitatively distinguishable from a criminal penalty. A criminal penalty is applied only in accordance with the sentence of a court and only in cases where a crime has been committed. The imposition of a criminal penalty is inextricably tied in with the institution of conviction and all the judicial consequences which flow therefrom . . . . These measures [imposed as penalties under the parasite legislation] do not constitute conviction . . . nor do the judicial consequences flowing therefrom apply. This is specifically noted in many of the laws of the republics directed towards the struggle against anti-social, parasitic elements. . . .[40]

This approach in itself presents an interesting example of the interrelationship of form and substance, facade and reality, in Soviet legal thinking. The failure to characterize as criminal a provision of law which provides severe penalties, involving loss of personal liberty, for conduct which is proscribed thereunder ignores the actual, substantive effect of the provision.[41] The Soviet characterization reflects a penchant for convenient labels even when by all criteria, other than Soviet, the label is misapplied.

There remains to be considered the validity of the Soviet claim of reform. It must be conceded that "social danger," the criterion under analogy, is no longer the technical basis for the imposition of criminal penalities. Further, there has been a change in the Soviet value requiring extraordinary protection, *i.e.*, the "build-

[38] Shliapochnikov, *op. cit. supra* note 21, at 68, Decision No. 6, Plenum of the Supreme Court of the USSR, *supra* note 32.
[39] *Ibid.*
[40] Shliapochnikov, *op. cit. supra* note 21, at 68.
[41] Highlights, *op. cit. supra* note 2, at 6.

ing of communism" rather than the regime itself. Thus, there is a technical, superficial basis for the claim that the Act of 25 December 1958, *supra*, has rejected the principle of analogy. Of overriding importance, however, is the fact that a Soviet citizen is still subject to severe, criminal-type penalties for conduct which does not violate any specific provision of the criminal code.

The quest for reality dictates the subservience of form to substance. In the case of the parasite legislation of the constituent republics of the Soviet Union that quest leads to the conclusion that the mentioned legislation is, in effect, reincarnation of the principle of analogy in a form tailored to meet the changed needs of the Soviet regime.

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